STIPULATED SINGLE APPENDIX

FIL
JUN 19
MICHAEL RODA

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1973

No. 73-1270

EUGENE C. KELLEY,
Petitioner,

vs.

SOUTHERN PACIFIC COMPANY, a corporation,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Petition for Writ of Certiorari Filed February 14, 1974
Certiorari Granted April 15, 1974

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DOCKET ENTRIES

Date	Filings—Proceedings
1966	
June 30—1	Filed complaint issued summons (jury demanded)
July 7—2	Filed summons on return.
July 25—3	Filed answer of defendants.
1969	
June 3	Pretrial conf. had & concl. Ord P/T ord lodged by 8/18/69 & con to 9/17/69, for Court Trial on all issue excepting damages. (Carter)
Sept. 12—69	Filed PRE-TRIAL ORDER; trial set for Sept. 17, 69, 10 AM. (Carter)
Oct. 7—73	Filed order denying deft's. mo. for summary judgment. (Levin)
Oct. 15	Ordered case set for ct tr on April 6, 1970 (Zirpoli)
April 16	Ord. ct tr resumed, after arguments by respective counsel the ct made a finding that the pltiff Eugene Kelley was covered by the Federal Employee's Act. Findings to be presented by counsel for Pltiff. Case conted to 1:30 p.m. May 6, 1970 to set for jry tr. (Zirpoli)

June 29—84—Filed Findings of Fact & Conclusion of Law ((1) At the time & place of this accident the work being performed by Eugene C. Kelley involved a non-delegable duty of Southern Pacific Co. which brought Pltiff within the traditional agency relationship to Southern Pacific Co. & in such relationship to Southern Pacific Co. as to be covered by the Federal Employers' Liability Act. (2) This court has jurisdiction under the Federal Employers' Liability Act, 45 USC Sec. 51 et seq.) (Zirpoli)

1970

Apr. 15—96—Entered Judgment in favor of pltf Eugene C. Kelley in amt. of $200,000.00. Filed 4/15/71

Apr. 16—Mailed Clerk's notice of entry of judgment.

May 12—99—Filed dc notice of Appeal. (Zirpoli)

Clerk's Transcript

[Filed Dec. 28, 1967]

[108] 14. Continued

Name	Employer	Director or Officer SP Co. and PMT CO.	Sou. Pac. Dir.	Sou. Pac. Ofr.	PMT Co. Ofr.
P. J. Kendall	SP CO	1945-1959	X	X	X
G. C. Baker	SP CO	1944-1947	X	X	
H. W. Klein	SP CO	1943-1955	X	X	
C. H. Grant	SP CO	1947-1958	X	X	
J. A. Quinn	SP CO	1949-1957	X		X
A. V. Casey	SP CO	1960-1961	X		X
B. F. Biaggini	SP CO	1958-1964	X	X	X
U. E. Nordeen	SP CO	1959-1961	X	X	X
H. J. Walker	SP CO	1951-1966	X	X	
T. F. Ryan	SP CO	1952-date	X		X
R. E. Plummer	SP CO	1958-1960	X		X
H. A. Nelson	SP CO	1961-1965	X	X	
J. B. Reid	SP CO	1961-date	X		X
D. K. McNear	SP CO	1964-date	X	X	X
A. C. Furth	SP CO	1963-date	X		X
L. E. Hoyt	SP CO	1966-date	X	X	

Address of all of above officers:
65 Market Street, San Francisco, California 94105

Interrogatory No. 15

15. Does defendant, Southern Pacific Company, pay any taxes incurred by Pacific Motor Trucking Company? If your answer is in the affirmative, please set forth for each year since the date of incorporation of Pacific Motor Trucking Company what percentage of taxes incurred by Pacific Motor Trucking Company were paid by defendant, Southern Pacific Company.

Answer

15. Southern Pacific Company does not pay any taxes incurred by Pacific Motor Trucking Company.

[111] *Interrogatory No. 20*

20. Are any monies, proceeds or financial assistance of defendant, Southern Pacific Company, used

for the purpose of financing the operation of Pacific Motor Trucking Company? If your answer is in the affirmative, what percentage of Pacific Motor Trucking Company's operational costs are derived from Southern Pacific Company monies, proceeds or financial assistance?

Answer

20. From time to time Southern Pacific Company has furnished funds to Pacific Motor Trucking Company for operational purposes. As of August 31, 1967, no such funds were being furnished, therefore percentage of Pacific Motor Trucking Company's operational costs derived from Southern Pacific Company's monies was -0-%.

Interrogatory No. 21

21. Since the date of incorporation by Pacific Motor Trucking Company, please set forth the percentage of the total capital stock of Pacific Motor Trucking Company which was owned by defendant, Southern Pacific Company, for each year from the date of incorporation of Pacific Motor Trucking Company up to January 1, 1966.

Answer

21. 100%, directly or indirectly.

Interrogatory No. 22

22. What was the dollar value of the capital stock

[116] *Interrogatory No. 33*

33. Set forth the name, and address of all railroad companies which Pacific Motor Trucking Company had contracts with regarding the unloading of tri-level auto carrier cars at Channel and Third Streets in the City and County of San Francisco, State of California, during the period between June 1, 1963, and August 1, 1963.

Answer

33. Southern Pacific Company.

Interrogatory No. 34

34. Set forth the name and address of all companies which defendant, Southern Pacific Company, had contracts with **[117]** regarding the unloading of tri-level auto carrier cars at Channel and Third Streets in the City and County of San Francisco, State of California between the dates of June 1, 1963, and August 1, 1963.

Answer

34. Pacific Motor Trucking Company.

Interrogatory No. 35

35. On the date this accident occurred, was there in effect a policy of insurance by or through which Pacific Motor Trucking Company was insured in any manner or to any extent, whether primary or excess, with respect to any claim, cause of action, injuries or damages alleged or claimed against Pacific Motor Trucking Company? If so, state:

a) The number of said policy or policies of insurance.

b) The name of the company or companies issuing said policies.

c) The name or names of the insureds.

d) The limits of liability of each policy.

Answer

35. Yes.

a) SF-29577
SPF-842

b) Lloyd's and English Companies
Transportation Mutual Insurance Company

c) Southern Pacific Company and/or subsidiary companies.

d) 60% of 100% of $5,000,000 any one loss in excess of $500,000 each and every loss.

40% of 100% of $5,000,000 any one loss in excess of $500,000 each and every loss.

[127] R. Jay Engel, Esq.
Jarvis, Miller & Stender
123 Second Street
San Francisco, California 94105
Telephone: 982-9617
Attorneys for Plaintiff

In the United States District Court
for the Northern District of California

No. 45344

Eugene C. Kelley,
Plaintiff,
vs.
Southern Pacific Company,
a corporation,
Defendant.

[Filed Jan. 10, 1968]

INTERROGATORIES PROPOUNDED BY PLAINTIFF TO DEFENDANT

To: Defendant above named, and to Corrigan & Roy, its attorneys:

Pursuant to the provisions of California Code of Civil Procedure, Section 2030, you are requested to answer in writing and under oath the following interrogatories within 15 days from the time service is made upon you. Please note that in answering these interrogatories you should furnish all information

possessed by or available to the defendant, its representatives, investigators and attorneys.

1. In the deposition of Mr. Roy A. Hedlund on September 6, 1967, Mr. Hedlund stated that the rate charged by Southern Pacific Company in certain instances include the charge involved of setting the automobiles off of a tri-level auto carrier onto the abutting ground. Mr. Hedlund further stated that whether these charges are included or not depends on the point of origin and the point of destination. With regard to Mr. Hedlund's testimony, please set forth the following:

(a) What points of origin and what points of destination give rise to a charge made by defendant, Southern Pacific Company, for the removing of automobiles from tri-level auto carriers as of July 5, 1963?

[147] Corrigan and Roy
Attorney at Law
65 Market Street, Room 834
San Francisco, California 94105
Telephone: 362-1212
Extension: 22513
Attorneys for Defendant

In the United States District Court
for the Northern District of California

No. 45344

Eugene C. Kelley,
Plaintiff,
vs.
Southern Pacific Company,
a corporation,
Defendant.

[Filed Sept. 17, 1968]

ANSWERS TO INTERROGATORIES

Comes Now defendant, Southern Pacific Company, a corporation, and answers those interrogatories heretofore proposed and propounded by plaintiff. The following answers have been prepared by Donald O. Roy, attorney and agent for said defendant and are based upon his information and belief from information available to said defendant at this time. The

information supplied in these answers has been obtained from the files of said Donald O. Roy.

1) Contrary to Mr. Hedlund's impression, all rates for inbound movement of automobiles on tri-level cars in July of 1963 included the charge for unloading the automobiles without regard to the origin of the particular shipment.

2) Yes.

[230] Workmen's Compensation Appeals Board
State of California
Case No. 65 SF 211-771

Eugene C. Kelley,
Applicant,
vs
Pacific Motor Trucking Company,
Defendant.

[Filed Feb. 9, 1966]

FINDINGS AND AWARD

Upon hearing before Edward C. Neely, Referee, and submission, said Referee now makes his decision as follows:

FINDINGS OF FACT

1. Eugene C. Kelley, born March 22, 1936, while employed as a freight handler at San Francisco, California, on July 3, 1963, by Pacific Motor Trucking Company, sustained injury arising out of and in the course of his employment. On said date, Pacific Motor Trucking Company was the employer's carrier for workmen's compensation insurance and the employee's wages were maximum.

2. Said injury caused temporary disability commencing July 4, 1963, continuing to and including August 10, 1965, for which applicant has been adequately compensated at the rate of $70 per week.

Defendants are entitled to credit for all payments made.

3. The injury herein also caused permanent disability of 100%.

4. No basis for apportionment exists herein.

5. Applicant is in need of further medical treatment, including the repair and replacement of appliances.

6. Applicant is entitled to reimbursement for self-procured medical treatment obtained from Fresno County Hospital, if said bill has not already been paid.

[231] 7. Applicant is entitled to reimbursement for medico-legal expense in the amount of $165 for the examination, x-rays and report of Dr Weitz.

8. Applicant's attorney has rendered services of the reasonable value of $750 and is entitled to a lien therefor.

AWARD

Award Is Made in favor of Eugene C. Kelley against Pacific Motor Trucking Company of

(a) permanent disability indemnity payable at the rate of $52.50 a week commencing August 18, 1965, and continuing for 400 weeks until the total sum of $21,000 shall have been paid, and thereafter a life pension at the rate of $48.46 per week, less credit to defendant for payments heretofore made, less an attorney's fee of $750 to John H. Lenz, Esq.;

(b) such further medical treatment as may reasonably be required to cure or relieve of the effects

of the injury herein, including repair and replacement of appliances; NOTE: Defendants should be given the opportunity to furnish same;

(c) reimbursement for self-procured medical treatment obtained from Fresno County Hospital, if said bill has not been paid;

(d) reimbursement for litigation expense in the amount of $165 payable to Ernest M. Weitz, M.D.

/s/ Edward C. Neely, Referee
Edward C. Neely, Referee
Workmen's Compensation Appeals Board

Filed and served on all parties as shown on Official Address Record on Feb. 9, 1966.

[179] NOTICE OF MOTION and MOTION FOR SUMMARY JUDGMENT

To Plaintiff Eugene C. Kelley and to his attorneys Messrs. Jarvis, Miller and Stender:

Please Take Notice that on Monday, August 11, at the hour of 10:00 A.M., or as soon thereafter as counsel may be heard, in the courtroom of the Law and Motion Department of the above-entitled court, Defendant, Southern Pacific Company, will move the court for summary judgment against Plaintiff and in favor of Defendant Southern Pacific Company. The ground of the motion will be the lack of jurisdiction of this court. The motion will be made and based upon this motion, all pleadings, records and files herein, including interrogatories and depositions on

file herein, upon the attached Affidavit of R. K. Booth, upon the attached Statement of Reasons and Authorities, and upon such further materials, oral and documentary, as the court may receive at the time of said hearing.

/s/ John J. Corrigan
John J. Corrigan
65 Market Street
San Francisco
DO 2-1212

[224] AFFIDAVIT OF R. K. BOOTH

I am Vice President and Controller of Pacific Motor Trucking Company. I am senior vice president of the company and have jurisdiction over commerce, accounting and other matters. I am a member of the Board of Directors of Pacific Motor Trucking and have been continuously involved in admistrative matters for the company since 1935. I make the following statements from my own personal knowledge, and I have inspected the appropriate company business records to aid in making this statement.

Pacific Motor Trucking Company is a corporation of the State of California incorporated in 1933. It has authorized 350,000 shares of $50.00 par value stock, and has outstanding 227,500 shares, all held now and in 1963 by Southern Pacific Company. Its present directors are B. R. Johnson, L. E. Hoyt, D. K. McNear and myself, none of whom is a director of Southern Pacific Company. Its principal officers are B. R. Johnson, President, myself, Vice President and Con-

troller, T. T. Edwards, Vice President and General Manager, and S. F. Jordan, Vice President-Sales, none of whom is an officer or director of Southern Pacific Company. The stockholders' annual meeting is held in San Francisco the first Monday in April: this year's meeting was held April 7, 1969. Directors' meetings are held as needed at such time and place as the Board may fix; in 1963 there were 8 meetings; in 1964, 14 meetings; in 1965, 8 meetings; in 1966, 8 meetings; in 1967, 8 meetings; in 1968, 15 meetings, and thus far this year, 6 meetings. Full and complete minutes are kept of each stockholders' and directors' meeting.

Pacific Motor Trucking Company operates as an interstate and intrastate motor common carrier over regular and irregular routes totaling over 15,000 highway route miles in the states [225] of Oregon, California, Nevada, Arizona, and New Mexico, to and from Vancouver, Washington, and to and from points in El Paso County, Texas. It is a member of the Regular Common Carrier Conference of the American Trucking Association and the California Trucking Association. Pacific Motor Trucking is authorized to and performs a direct service to the public. For many years a substantial portion of the gross income of Pacific Motor Trucking has come from its services rendered directly for the public, and for every year since 1956, 50 percent or more has come from such sources. In 1968 Pacific Motor Trucking carried 7,533,894 tons of freight and operated in excess of 52,563,933 million power unit miles. In addition to

its common carrier functions, Pacific Motor Trucking Company operates various unloading and local delivery services under contract for freight forwarders and railroads, including railroads not affiliated with or controlled by Southern Pacific Company. Southern Pacific Company employs firms other than PMT to perform unloading services, even at locations which PMT serves. In addition, PMT subcontracts to trucking companies such as Commercial Carriers, Insured Transporters, Robertson Truckaway and others contracts to unload multi-level cars at certain locations. PMT handles containerized traffic for steamship companies, and transports new automobiles to California and Nevada points. As such, it is one of the largest auto transporters in the country. Pacific Motor Trucking neither owns nor controls any railroad track, rolling stock or motive power, and conducts no railroad operations. Southern Pacific Company neither owns nor operates any trucks or vehicles in motor common carrier service, nor does it hold any certificates for motor common carrier operation. Pacific Motor Trucking Company holds certificates of public convenience [226] for its common carrier services.

Pacific Motor Trucking Company maintains general offices at 9 Main Street, San Francisco, which is completely separate and apart from the general offices of Southern Pacific. All the principal officers of Pacific Motor Trucking are situated at 9 Main Street, and no Southern Pacific Company officers have offices with PMT. PMT maintains at this location executive, operating, traffic, sales, accounting, personnel

and other departments. These departments and officers are completely separate and apart from Southern Pacific Company and form no part of any corresponding Southern Pacific Company departments. The officers and employees of Pacific Motor Trucking Company report directly to their superiors within the company and ultimately to the President of PMT, and they neither report to nor are subject to the supervision of Southern Pacific Company personnel. Certain functions such as claims investigation and legal representation are handled by Southern Pacific Company for Pacific Motor Trucking Company, but when this is done Pacific Motor Trucking Company pays for the services rendered. As noted, such services do not extend to executive, operating traffic, sales, accounting, or personnel functions—all of which are handled by PMT for itself.

Pacific Motor Trucking Company is subject to Part II of the Interstate Commerce Act. PMT submits to the ICC the Motor Carriers Annual Report, the Annual Report of Freight Commodity Statistics, and the Quarterly Report of Revenue, Expenses and Statistics for Class I Motor Carriers of General Freight. These reports are signed and submitted by Pacific Motor Trucking Company officers.

As of December 31, 1968, Pacific Motor Trucking Company had assets of $37,139,829, and liabilities of $9,485,844. **[227]** Cash and other current assets amount to $9,754,846; accounts payable are $3,092,991. Total investment in carrier operating property as of December 31, 1968, was $46,456,781; accrued deprecia-

tion amounted to $25,192,091, leaving a net investment of $21,264,690. Operating results in 1968 showed the following: revenue $59,901,699; expenses (including taxes) $58,375,152; income $1,526,547. PMT Company accrues its own revenues and pays its own expenses and no part of such expenses is paid by Southern Pacific Company. All accounts and accounting of Pacific Motor Trucking Company are separate and distinct from any accounts of Southern Pacific Company. PMT keeps accounts in accordance with regulations issued by the Interstate Commerce Commission for Motor Common Carriers, and this system is completely different from the Uniform System of Accounts for Railroad Companies, which Southern Pacific Company follows. There has never been a dividend declared on the PMT stock and no part of PMT's assets, whether surplus or otherwise, has ever been transferred to Southern Pacific Company by any means, nor are there any plans or proposals for doing so.

In order to maintain its self-insurance status for Workmen's Compensation liabilities in the State of California, Pacific Motor Trucking Company maintains on file with the Department of Industrial Relations of the State of California a bond equal to one hundred twenty-five percent of its outstanding liabilities. The amount of this bond is reviewed and readjusted annually by the State of California. In addition, PMT Company maintains a reserve account for its Workmen's Compensation liability, including liability to Mr. Eugene C. Kelley.

Pacific Motor Trucking Company has approximately 4,000 employees, including approximately 2,000 drivers. **[228]** It owns approximately 6,000 pieces of trucking equipment. It publishes tariffs, issues bills of lading, and conducts its common carrier and other services for the public entirely with its own personnel, equipment and terminals. Drivers, dock and mechanical personnel are members of the Teamsters and Machinists unions and not members of any railroad brotherhood or union. Labor collective bargaining agreements are negotiated by PMT Company officers with all its union affiliations. All PMT employers are paid by vouchers drawn on PMT Company and out of PMT accounts. No PMT employee is carried on Southern Pacific Company payrolls.

Eugene C. Kelley, the plaintiff in this suit, was employed by Pacific Motor Trucking Company as a platform man on June 16, 1955, and worked for it continuously to and including his accident in July 1963, except for a brief period in September and October 1960, when he was on leave of absence. Pacific Motor Trucking Company paid his wages and supervised and directed his work continuously during this period. Pacific Motor Trucking Company had the right to discharge him from its employ subject to the provisions of his collective bargaining agreement. Pacific Motor Trucking Company has paid workmen's compensation benefits and furnished medical care to Mr. Kelley continuously since the date of his accident, pursuant to the workmen's compensation

laws of the State of California and an award made to him by the Industrial Accident Commission (now Workmen's Compensation Appeals Board). True copies of Mr. Kelley's application for benefits and of the award are attached hereto. As of the present time over $7,000 of medical care, drugs, etc., has been furnished, and Mr. Kelley has been paid over $20,000 in compensation benefits.

[229] State of California,
City and County of San Francisco. — ss.

I have read the foregoing affidavit and the statements in it are true of my own knowledge, except as to matters stated on information and belief, and as to those matters I believe them to be true. I am authorized to make this affidavit on behalf of Pacific Motor Trucking Company.

Executed at San Francisco July 1, 1969.

/s/ R. K. Booth
R. K. Booth

Subscribed and sworn to before me this 1st day of July, 1969.

(Seal) /s/ John E. Jurgens
John E. Jurgens
Notary Public-California
Principal Place of Business in
City and County of San Francisco.

My Commission Expires June 13, 1973.

[233] State of California
Industrial Accident Commission

APPLICATION

[Filed October 2, 1965]

Case No. 65 S.F. 211-771

File Signed Original and Six Copies
(Please Print or Type Names and Addresses)

Eugene C. Kelley, (Social Security No. 567-42-3742), 1253 Victor Avenue, San Leandro, California.

Pacific Motor Trucking Company, 9 Main Street, San Francisco, California.

Southern Pacific Company, 65 Market Street, San Francisco, California.

1. It is alleged that Eugene C. Kelley, 3/22/36 (Date of Birth), while employed on July 3, 1963 as a freight handler at San Francisco, California, by Pacific Motor Trucking Company sustained injury arising out of and occurring in the course

of employment. (State what parts of body were injured and subsequently results)—back left arm. (Explain what employee was doing at time of injury and how injury was received) Untieing cars on loading dock—hand hold let go; fell 15 feet, landed on back, left arm.

2. Actual earnings at time of injury $168. per week. The basis of pay was: $3.25 hr.

3.

4. Was compensation paid? Yes. $70.00 (weekly rate). Have you received unemployment or unemployment compensation disability benefits since the date of injury?

5. Was medical treatment received? Yes. State date last received:

   Was all treatment provided by the employer or insurance company? Yes. If not, state who provided it.

   Also state names and addresses of all doctors who treated or examined for this injury. S. P. Hospital; Dr. Williams; Dr. Phipps.

6. This application is filed because of disagreement regarding liability for:
   Temporary disability ..... Permanent disability ...X... Proper Compensation Rate ..... Self-procured medical costs ...X... Litigation costs ...X... Medical treatment ...X... Other ..... Specify:

7. Have you ever had a case for another injury before the California Commission?

WHEREFORE, applicant requests a hearing and awards for all appropriate benefits provided by law.

Dated at San Francisco, California, 10/21/65

Hearing requested at San Francisco.
Please set ..X..; set later on written request .....
Estimated time of trial

/s/ Eugene C. Kelley
/s/ John H. Lenz

123 Second St., S. F. YUkon 2-9617

10-26-65—Served all parties.

AK

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[250] In the United States District Court for the Northern District of California

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No. 45344

Eugene C. Kelley,
Plaintiff,
vs.
Southern Pacific Company, a corporation,
Defendant.

[Filed September 8, 1969]

MEMORANDUM IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT

I

INTRODUCTION

This action arises out of an accident that occurred July 3, 1963, at Channel and Third Streets in the City and County of San Francisco, State of California. The action arises under the Federal Employers Liability Act 45 U.S.C. 51, et seq.

The defendant Southern Pacific Company has filed a Motion for Summary Judgment based on their contention that the plaintiff Eugene Kelley at the time of the accident in question was not an employee covered by the Federal Employers Liability Act. This Memorandum is filed in opposition to that Motion.

The defendants in their Motion misstate the issue that is now before this court. The issue is: "Was the injured plaintiff Eugene Kelley an employee of an agent or adjunct of the defendant railroad company, Southern Pacific Company, and consequently treated as an employee of the railroad for purposes of the Federal Employers Liability Act."

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[261] V

CONCLUSION

It is submitted that the above authorities clearly substantiate the proposition that Federal Employers Liability Act is extended to employees of agents of defendant Southern Pacific Company. Defendant

Southern Pacific Company concedes that the plaintiff Eugene Kelley was an employee of Pacific Motor Trucking Company. It is submitted that the above authorities further stand for the proposition that the question of whether Pacific Motor Trucking Company is an "agent" of defendant Southern Pacific Company is a question of fact. It is submitted that the above interrogatories and depositions not only present a question of fact with regard to whether Pacific Motor Trucking Company is an "agent" of defendant Southern Pacific but also substantiate the conclusion that PMT is such an "agent" and that consequently the plaintiff Eugene Kelley is entitled to coverage under the Federal Employers Liability Act. It is submitted this court has jurisdiction of the above action and defendant's motion for summary judgment should be denied.

Dated:..... and signed by me.

/s/ R. Jay Engel
R. Jay Engel

---

[265] V

CONTESTED ISSUES OF FACT

The contested issues of fact are:

(1) Whether in fact plaintiff Kelley had an employment relationship with defendant sufficient to invoke the FELA.

(2) Whether in fact Pacific Motor Trucking Company was the alter ego of Southern Pacific Company.

[281] R. Jay Engel
Attorney at Law
Columbus Towers
916 Kearny Street
San Francisco, California 94113
(415) Exbrook 2-5520
Attorney for Plaintiff

In the United States District Court
for the Northern District
of California
No. 45344

Eugene C. Kelley,
Plaintiff,
vs.
Southern Pacific Company,
a corporation,
Defendant.

[Filed October 7, 1969]

ORDER DENYING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

This matter came on for hearing before the Honorable Gerald S. Levin. R. Jay Engel, Esquire, 916 Kearny Street, Suite 201, San Francisco, California 94133 appeared on behalf of the plaintiff; John Corrigan and Donald Roy appeared on behalf of the defendant.

Good Cause Appearing Therefore, it is hereby ordered and decreed that defendant's motion for Summary Judgment is denied.

Dated: October 7, 1969.

/s/ Gerald S. Levin
Judge Gerald S. Levin

[292] In the United State District Court
For the Northern District of California

No. 45344

Eugene C. Kelley,
Plaintiff,
vs.
Southern Pacific Company,
a corporation,
Defendant.

[Filed April 6, 1970]

TRIAL MEMORANDUM

I

Introduction

This action arises out of an accident that occurred July 3, 1963, at Channel and Third Streets in the City and County of San Francisco, State of California. The action arises under the Federal Employers Liability Act, 45 U.S.C. 51, et seq.

The defendant, Southern Pacific Company, filed a Motion for Summary Judgment based on their contention that the plaintiff, Eugene Kelley, at the time of the accident in question, was not an employee covered by the Federal Employers Liability Act. This motion was denied.

Pursuant to the Pre-Trial Order, the trial of this matter has been bifurcated. The only issue now before this Court is:

1. Whether in fact plaintiff Kelley had an employment relationship with defendant sufficient to invoke the [293] FELA.

The proper criteria for determining whether or not the plaintiff is entitled to FELA coverage are: 1. Was the injured plaintiff, Eugene Kelley, an employee of an agent or adjunct of the defendant railroad company, Southern Pacific Company, and consequently treated as an employee of the railroad for purposes of the Federal Employer's Liability Act; and/or 2. Was the plaintiff Kelley performing acts within the "operational activity" of the defendant railroad company thus entitling him to coverage under the Federal Employer's Liability Act.

For purposes of this trial under the Federal Employer's Liability Act plaintiff withdraws the issue as to whether Pacific Motor Trucking Company was the alter-ego of the defendant, Southern Pacific Company, as set forth in the Pre-Trial Order.

[310] In the United States District Court
For the Northern District of California

No. 45344

Eugene C. Kelley,
Plaintiff,
vs.
Southern Pacific Company,
a corporation,
Defendant.

CLOSING BRIEF

[315] There is no attempt going to be made on the part of the plaintiff to argue that all employees of Pacific Motor **[316]** Trucking Company come within that "sufficient" relationship as to Southern Pacific Company. Rather, only as to those employees who are in fact unloading tri-level auto carriers at this location.

In the United States District Court
for the Northern District of California

Eugene C. Kelley,
Plaintiff,
vs.
Southern Pacific Company,
a corporation,
Defendant.

[Filed—Jun 29 1970]

FINDINGS OF FACT AND CONCLUSIONS OF LAW.

From the record and the evidence the court finds:

FINDINGS OF FACT

I. Plaintiff, Eugene C. Kelley, was injured July 3, 1963, at the multi-level railroad car loading and unloading ramp of defendant, Southern Pacific Company, at 4th and Channel Streets, San Francisco, California. At such time and place, plaintiff, along with three other persons, was unchaining new automobiles for unloading when he fell from the third level of a tri-level railroad car.

II. Plaintiff and the three men he was working with at the time of his fall were hired, paid by and could be discharged by Pacific Motor Trucking Company and were in the employment of Pacific Motor Trucking Company.

III. Plaintiff had been employed at this particular job (unloading of automobiles for the Southern Pa-

cific Company) and location on a full time basis for a period of eight years and he was paid for his services on an hourly basis.

IV. The unloading of automobiles, the work being performed by plaintiff, at the unloading ramp of Southern Pacific Company was the responsibility of Southern Pacific Company, to be performed by it or through its agents in the regular course of its business pursuant to its contractual responsibilities to the shippers and its tariff responsibilities.

V. At all times relevant to the unloading of the automobiles Pacific Motor Trucking Company in the unloading of the automobiles at the Southern Pacific Company ramp was acting as the agent of Southern Pacific Company.

VI. The record is not clear as to who supplied the hammers and ratchet wrenches used by the plaintiff in his unloading operations. The record is clear and the court finds Southern Pacific Company supplied the necessary ramps and working area required to perform the unskilled work being performed by plaintiff at the time of the injury in question.

VII. Southern Pacific Company employees had the responsibility to and were required to daily check the safety of the tri-level cars and the safety railing thereof and to make all necessary repairs.

VIII. The responsibility for immediate supervision and control of the unloading operations here in question was that of Southern Pacific Company, even though the exercise thereof was executed by employees of Pacific Motor Trucking Company, who in such

work were acting as agents of Southern Pacific Company.

IX. The work being performed by plaintiff on July 3, 1963 was in fulfillment of a non-delegable duty of defendant Southern Pacific Company which brought plaintiff within the traditional agency relationship, and in such relationship to defendant Southern Pacific Company as to be covered by the Federal Employers' Liability Act.

CONCLUSIONS OF LAW

I. At the time and place of this accident the work being performed by Eugene C. Kelley involved a non-delegable duty of the Southern Pacific Company which brought plaintiff within the traditional agency relationship to Southern Pacific Company and in such relationship to Southern Pacific Company as to be covered by the Federal Employers' Liability Act.

II. This court has jurisdiction under the Federal Employers' Liability Act, 45 U.S.C. § 51 et seq.*

Dated: June 29, 1970.

/s/ Alfonso J. Zirpoli
United States District Judge

*In making the above findings of fact and conclusions of law the court gave consideration to the rulings in *Baker v. Texas and Pacific Railroad*, 359 U.S. 227 (1959); and *Ward v. Atlantic Coast Line*, 362 U.S. 396 (1960); and *Smith v. Norfolk & Western Railway Company*, 407 F.2d 501 (1969); Restatement, Agency 2d, Section 220.

[387] In the United States District Court
for the Northern District of California

No. 45344-AJZ

Eugene C. Kelley,
Plaintiff,
vs.
Southern Pacific Company,
a corporation,
Defendant.

JUDGMENT

This matter having come before the Court on Friday, April 2, 1971 for further proceedings both parties stipulated to waive of jury as to any further proceedings. The Court having heard all the proceedings prior hereto and having signed its Findings of Fact and Conclusions of Law on June 29, 1970 and upon further stipulation entered in open Court between the parties on April 2, 1971, the Court enters the following judgment and final order:

Judgment is Entered in favor of the plaintiff, Eugene C. Kelley, and against defendant, Southern Pacific Company, and damages are awarded and assessed in the amount of $200,000.00. Plaintiff to submit his cost bill to the clerk.

Dated: April 15, 1971.

/s/ Alfonso J. Zirpoli
Alphonso J. Zirpoli

Approved as to Form:
/s/ John J. Corrigan
John J. Corrigan
Attorney for defendant
Dated: April 12, 1971

United States Court of Appeals
for the Ninth Circuit

No. 71-2262

Eugene C. Kelley,
Appellee,
vs.
Southern Pacific Company, a corporation,
Appellant.

[September 7, 1973]

Appeal from the United States District Court
for the Northern District of California

Before: HASTIE,* BROWNING and WRIGHT,
Circuit Judges.

HASTIE, Circuit Judge.

This is an appeal by Southern Pacific Co., a railroad, from a money judgment recovered by Eugene Kelley, a workman, in an action for negligent injury under the Federal Employers' Liability Act, 45 U.S.C. §1.

The only matter in dispute is whether the relationship between Kelley and Southern Pacific was such

*The Honorable William H. Hastie, senior United States Circuit Judge of the Third Circuit, sitting by designation.

as to bring the tort in suit within the coverage of the F.E.L.A. By agreement of the parties, the issues, factual as well as legal, upon which liability depended were tried to the district court without a jury. After an evidentiary hearing the court entered findings of fact and conclusions of law and imposed liability on the railroad.

The controlling language of the F.E.L.A. makes a "common carrier by railroad . . . liable in damages to any person suffering injury [as a result of the railroad's negligence] while he is employed by such carrier . . . ." The disputed question here is whether Kelley was "employed by" Southern Pacific within the meaning of the statute.

Kelley was seriously injured while he was engaged in unloading automobiles from a Southern Pacific trilevel flat car after the arrival of the shipment at its San Francisco destination. In the language of the district court's finding of fact, amply supported by the evidence: "Plaintiff and the three men he was working with at the time of his fall were hired, paid by and could be discharged by Pacific Motor Trucking Company and were in the employment of Pacific Motor Trucking Company".[1] That company is a motor common carrier that operates over 15,000 route miles in the western states. Although all of its stock is owned by Southern Pacific, the Trucking Company functions as a distinct entity. Neither in the district

[1]As a result of the accident Kelley had applied for and was awarded as a Trucking Company employee, full workmen's compensation benefits for total disability.

court nor on this appeal has a case been made for piercing the corporate veil and disregarding the separate legal and functional identity of the Trucking Company. *Cf. Fawcett v. Missouri Pac. R.R.*, W.D. La. 1965, 242 F.Supp. 675, *aff'd. per curiam* 5th Cir. 1965, 347 F.2d 233, *cert. denied* 382 U.S. 907.

The relevant Southern Pacific tariff enabled a shipper of new automobiles by rail to take delivery either before or after the "grounding" of the automobiles. In this case the shipper had elected to have the automobiles grounded before delivery and had paid Southern Pacific a standard added charge for this unloading service.

The Trucking Company contracted with Southern Pacific to perform for specified unit prices such unloading of automobiles from railway cars as the railroad should require. Thus, in the unloading operation, Kelley was both performing his normal work for and assigned to him by his regular employer, the Trucking Company, and at the same time enabling the railroad to discharge its contractual responsibility to the shipper. Appropriately, Kelley was a member of the Teamsters union and not of one of the railroad craft unions.

As stated above, the district court explicitly found that Kelley was an employee of the Trucking Company. Moreover, after considering the evidence on control and supervision, the court declined to make a finding proposed by the plaintiff that Kelley was an employee of Southern Pacific. Thus, the court did not find or proceed on the basis that Kelley was either a borrowed servant, temporarily in the employment

of Southern Pacific, or that he was a servant in the employ of both companies. Rather, the court adopted a special concept of "employment" for F.E.L.A. purposes that has found favor with the Court of Appeals for the Fourth Circuit in a case that is not significantly different from this case. *Smith v. Norfolk & W. Ry.*, 4th Cir. 1969, 407 F.2d 501.

The district court reasoned, adopting the Fourth Circuit analysis, that, under its contract with the shipper, the railroad was legally obligated to have the automobiles unloaded from its cars and that in performing that work the "employees of Pacific Motor Trucking Company . . . were acting as agents of Southern Pacific Company." This led to the court's conclusion of law that "[a]t the time and place of this accident the work being performed by Eugene C. Kelley involved a non-delegable duty on the Southern Pacific Company which brought plaintiff within the traditional agency relationship to Southern Pacific Company and in such relationship to Southern Pacific Company as to be covered by the Federal Employers' Liability Act". Thus, the district court, not persuaded by the evidence that Kelley was a servant or an employee of Southern Pacific in common law conception, concluded that the "agency relation" which resulted from Southern Pacific's contracting with Kelley's employer to perform Southern Pacific's "non-delegable" contractual duty to its shipper sufficed to bring Kelley's status vis-à-vis the railroad within the F.E.L.A.

Our difficulty with this analysis begins with what the Supreme Court said in the leading case of *Baker v. Texas & Pac. Ry.*, 1959, 359 U.S. 227, 228:

> "The Federal Employers Liability Act does not use the terms 'employee' and 'employed' in any special sense, Robinson v. Baltimore & Ohio R. Co., 237 U.S. 84, 94, so that the familiar general legal problems as to whose 'employee' or 'servant' a worker is at a given time present themselves as matters of federal law under the Act."

Thus, the F.E.L.A. is applicable only when a common law master-servant relationship exists between the railroad and the person injured by its negligence. The relationship of principal and agent, which the court as trier of fact found and upon which it relied in this case does not suffice.

We are reinforced in this view by consideration that, apart from the *Smith* case in the Fourth Circuit, considered decisions in this circuit and elsewhere have rejected the contention that employees of a contractor, engaged by a railroad to perform work that is the railroad's responsibility, become railroad employees *ipso facto*. *Dougall v. Spokane, P. & S. Ry.*, 9th Cir., 1953, 207 F.2d 843 (right of way maintenance work); *Norman v. Spokane, P. & S. Ry.*, D.Ore. 1950, 101 F.Supp. 350, *aff'd. per curiam* "for the reasons given in the district court's opinion", 9th Cir. 1951, 192 F.2d 1020 (railroad bridge repair); *Tarboro v. Reading Co.*, 3d Cir. 1968, 396 F.2d 941 (unloading coal cars); *Turpin v. Chicago, B. & O. Ry.*, Mo. 1966, 403 S.W.2d 233, *cert. denied*, 384 U.S. 1003 (unloading flat cars).

It also merits mention that years ago Congress considered and rejected a proposal to include companies that provide railroad accessorial services under the

F.E.L.A. In 1939, Congress amended the F.E.L.A., 53 *Stat.* 1404, and in the process considered various proposals. One proposal would have extended coverage to suppliers of accessorial services and their employees. Its rejection, after extensive committee hearings, was announced by the Senate Judiciary Committee in reporting the bill that ultimately passed.

> "The bill as introduced was intended to broaden the application of the act to include express, freight forwarding and sleeping-car companies. Upon the hearings it was clearly shown that there is neither necessity nor demand for the inclusion of these companies in the act. Therefore, they have been excluded from the substitute." S.Rep. No. 661, 76th Cong., 1st Sess.

The result which Congress deemed undesirable and, therefore, refused to legislate directly, should not, in our view, be achieved judicially by treating employees of contractors rendering accessorial services as if they were employees of the railroad when common law analysis has failed to yield that conclusion.

The judgment is reversed.

Office of the Clerk

United States Court of Appeals for the Ninth Circuit
U.S. Court of Appeals and Post Office Building
7th & Mission Streets, P.O. Box 547
San Francisco, California 94101

Re: No. 71-2262 Eugene C. Kelley
vs
Southern Pacific Company

Dear Sir:

An opinion in the above case was filed today, and pursuant to Rule 36 of the Federal Rules of Appellate Procedure a judgment was entered SEP 7 1973 REVERSED the judgment or order of the court below (or administrative agency).

Pursuant to Rule 41(a) the mandate of this court will issue 21 days after the entry of judgment, unless the court enters an order otherwise, or grants a stay of the mandate or a petition for rehearing is filed. If a petition for rehearing is filed and denied, the mandate shall issue 7 days after the entry of the order denying the petition.

Very truly yours,

Clerk
U.S. Court of Appeals

United States Court of Appeals
for the Ninth Circuit

No. 71-2262

Eugene C. Kelley,
Appellee,
vs.
Southern Pacific Company,
a corporation,
Appellant.

[Filed Nov. 21, 1973]

ORDER

Before: HASTIE,* BROWNING, and WRIGHT, Circuit Judges

The panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for a rehearing in banc.

The full court has been advised of the suggestion for in banc hearing, and no judge of the court has requested a vote on the suggestion for rehearing in banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing in banc is rejected.

Dated: November 21, 1973

*Honorable William H. Hastie, Senior Judge, United States Court of Appeals for the Third Circuit, sitting by designation.

Reporter's Transcript

[4] The Court: May I ask you a question? If your theory is correct, why do you need this evidence? If your theory of pickup and delivery and your operational theory is correct, why do you need any of this evidence of control?

Mr. Engel: Well, Your Honor, what our purpose in putting the evidence on is to actually anticipate any argument that the defense may have with regard to the Smith case. In other words, we intend to show, and I think the interrogatories in fact, and the depositions, show as much factual basis for decision as existed in the Smith case.

The Court: Well, they would be justified in the sense **[5]** of putting that evidence on for the purpose of showing that there is no control, number one, under the borrowed servant doctrine. But I don't know what purpose it would serve for them if the very nature of the business transaction makes the trucking company the agent. What difference does it make whether there is any control or not? I am just asking the questions.

[17] Mr. Engel: But he is talking in terms of——

The Court: Well, he is talking in terms of, his theory is that the Act speaks of employees of a railroad, these people are not employees of the railroad, and no matter what other theory you want to invoke. Congress never extended **[18]** it beyond actual employees of the railroad.

[Mr. Corrigan, counsel for defendant]

[19] The Court: Isn't that what he is saying, though? Isn't he saying that you can't delegate the

responsibility of unloading the cars to someone else?

Mr. Corrigan: But you see——

The Court: Go ahead.

[32] Q. Now, when you say to untie, what is untying, what do you do?

A. Well, it's a rachet on there and you have to break the rachet loose so you can get the slack off the chain.

Q. Now, we are talking about automobiles that are loaded on one of these tri-level cars, and they come into this yard, is that correct?

A. Right.

Q. And these automobiles—are they attached some way to the tri-level?

A. Just by chains.

[33] Q. All right, and the chain, is it attached to the tri-level?

A. To a rachet.

Q. All right. It's connected to the actual train car, is that correct?

A. Yes, it is.

Q. And this chain is then hooked to the automobile?

A. Not the chain itself; there's another hook attached to the chain.

Q. All right. Now, the untying process, what does it do in relationship to that?

A. It loosens the chain.

Q. All right. Does it actually come unattached or unhooked from the automobile?

A. No.

Q. And then you say then two people, the other two people do what?

A. Take the hooks off the car.

Q. Now, after that process is done, then what's the next procedure?

A. Drive them off.

[52] Q. Now, do you know a gentleman by the name of Mr. Holland?

A. Yes, I do.

[53] Q. And did you have occasion to see him down at this piggyback area?

A. Every day.

Q. And did he ever have occasion to tell you to do anything?

A. Not tell me; asked me.

Q. All right, and what did he ask you to do?

A. The same as Mr. Hedland, lift the plate, lower the plate.

Q. How about the safety rails that we have referred to? Would he have occasion to ask you to lower or raise those?

A. Just lower them.

Q. All right. Mr. Morse—do you know him?

A. Yes.

Q. Who was he?

A. He is an S.P. clerk on the night shift.

The Court: What's his name?

Mr. Engel: Mr. Morse, M-o-r-s-e.

Q. Who was Mr. Holland's employer?

A. Southern Pacific.

Q. And who was Mr. Morse's employer?

A. Southern Pacific.

Q. And what job does Mr. Morse have there?

A. Same as Mr. Holland, except at night.

[54] Q. All right. And did you have occasion to have him tell you or ask you the same things that you refer to as to Mr. Holland?

A. Yes.

Q. Now, have you ever had occasion to ride the railroad yourself as a passenger?

A. Yes.

Q. Have you ever had occasion to ride it free?

A. Yes.

Q. And do you know if——

A. No, no. Sorry, not free: Half price.

Q. Do you know if you can get a free pass yourself?

A. I am entitled to one after ten years.

Q. And ten years with your present employment?

A. Yes.

Q. And how long have you been so employed?

A. It will be ten years in September of this year.

Q. And at that time it's your understanding that you are entitled to a free railroad pass?

A. Yes, I am.

The Court: What accommodations does that mean you are entitled to, coach?

The Witness: Yes.

Mr. Engel: Q. How about a man named Freddie, do you know who he is?

[55] A. He's a car whacker.

Q. All right, and what is a car whacker?

A. Check the brakes and check everything is all right, the stanchions are all right. If the stanchions are broke, he will have to fix it.

Q. Stanchions? What are you referring to?

A. On a flatcar there is two stanchions on each car to hold the trailer up.

Q. Okay. And have you ever had occasion for Freddie to ask you or tell you to do something?

A. Yes.

Q. Like what?

A. Same as Mr. Holland and Mr. Morse.

Q. All right, anybody else down there you have had occasion—strike that.

Who is Freddie's employer?

A Southern Pacific.

Q. Now, is there any other Southern Pacific employee that you are aware of that has asked you or told you to do anything?

A. No, I can't remember.

Q. How about, is there a heavy set man there that comes down there, with a cigar?

A. Oh, yes. He works there nights. Used to work there.

[56] Q. And have you ever had occasion to have any kind of trouble with him?

Mr. Corrigan: I am sorry, Your Honor, I object. This case has gone on discovery, but I object to reference to the heavy-set man with a cigar unless he is identified.

Mr. Engel: Q. Do you know who his employer was?

A. Southern Pacific, but I don't know his name. I can't remember it.

Mr. Engel: I will submit, Your Honor, the question is what his frame of mind is, as opposed to what the actual status of the man is, anyway.

The Court: All right. Well, anyway, I am not going to worry about it. I will accept it.

But let me ask you a question here. You were talking about this man. What's he supposed to do?

Mr. Engel: The heavy-set man?

The Court: Yes.

Mr. Engel: I was just going to ask him.

The Court: Oh, all right. The question was, did you ever have any trouble with him?

Mr. Engel: Yes.

The Court: And I really would sustain that objection to that, because that calls for some kind of a conclusion. I would like to know what transpired and not just categorize it.

[57] Mr. Engel: Right, Your Honor. I didn't know he answered that yet.

Q. Have you had occasion to have some trouble with the heavy-set man that smokes a cigar that is employed by the Southern Pacific?

A. Yes, I did.

Q. All right, can you tell us what that was?

Mr. Corrigan: Your Honor, just for the purposes of the record, can I also interject an objection, unless it's established that this trouble and these conversations are prior to July 3, 1963? That's the date of the accident.

Mr. Engel: Q. All right, when was this? Was it before or after Kelley's accident?

A. I think it was after.

Q. All right. Can you tell us what the nature of that problem was?

A. Well, I was loading the train at the time, and ——

Mr. Corrigan: Sorry, Your Honor, I object to any trouble he may have had with any employees after the accident. We are interested in the situation——

The Court: Well, let's find out. Approximately when did this incident you are now talking about occur? Approximately when?

Mr. Engel: Q. What's your best recollection as to when it occurred?

[58] A. I can't remember the date.

The Court: Well, approximately the date.

The Witness: '60 to '65.

The Court: You left there in '65?

The Witness: Yes, sir.

The Court: So somewhere from '60 to '65. Did this incident occur, that you are about to relate—is this an incident that pertains to the loading or unloading of automobiles?

The Witness: Not automobiles, trailers.

The Court: A form of motor vehicle, you mean—piggyback?

The Witness: Piggyback, yes.

The Court: And these are—what is the type of a piggyback you are talking about?

The Witness: Carload vans on trailers.

The Court: It's taking them off of the flatcar?

The Witness: Yes.

The Court: To the railroad yard?

The Witness: Yes.

The Court: And taking it away by a motor and cab?

The Witness: Yes.

Mr. Engel: Your Honor, I think it goes to the weight rather than—the objection goes to the weight rather than the materiality of it.

[59] Mr. Corrigan: Except, Your Honor, that he has already testified that whenever this conversation that he's going to tell us about, if he does, occurred, it occurred after, he knows that much—it occurred after the accident.

The Court: Well, assuming that it occurred after, there may be a question of its weight, but I can't say that it's entirely irrelevant. It might have some bearing on a practice. I will permit it.

Mr. Engel: Q. All right, can you explain what transpired?

A. Well, I was loading the train at the time, and we had an early train that left at three o'clock. And we had this gentleman from back East checking a certain type of flatcar, and I had a—a van had to be on the train and he wanted me to show him how to hook up the van.

Q. Who is "he"?

A. The gentleman from back East, works for some car outfit. I forget the name. Anyway, the van missed

the train and he went over and told Mr. Helwig and I was taken off the job.

Q. All right.

The Court: The van missed the train?

The Witness: Yes.

The Court: In other words, this was a loading job?

The Witness: Yes.

[60] The Court: And you didn't get it on on time?

The Witness: Right.

The Court: All right.

Mr. Engel: Q. Now, this man that you are talking about; it was your understanding he was employed by Southern Pacific?

A. Yes, he was.

Q. Now, you mentioned the name of Jarvis and Hedland and Holland and Morse and then this heavy-set man and Freddie. You mentioned that they asked or told you to do things, and you have done these things as a result of that, is that correct?

A. Yes.

Q. Now, was there any feeling on your part that a refusal to do so would jeopardize your job in any way?

Mr. Corrigan: Your Honor, I would object to that question, what his feeling might have been.

Mr. Engel: Well, one of the questions that .... All right, withdraw the question, Your Honor.

Q. Now, as to other individuals, did you see any other employees of Southern Pacific Company who checked the automobiles themselves, at any time?

A. Just Mr. Schriber or Mr. Jarvis. I am sorry.

Q. All right. How about any S.P. clerks or employees who would check for damage on the automobiles before [61] you loaded them?

A. Yes, there was.

Q. And did they do this to all automobiles that were being loaded?

A. All the used cars going out.

Q. And was this checking that they did before or after the automobiles were loaded?

A. Before.

Q. And was it your understanding this checking had to take place before the automobiles would be loaded?

A. Yes.

Q. Did you have to get some kind of a clearance from these men to see whether they had been checked or not before you could load them?

A. Yes.

The Court: What do they do, mark the car?

The Witness: Yes, put an X on it—or verbally. We will stand right alongside, and when they are finished, we will load it.

The Court: All right.

[62] Q. Have you ever had occasion to borrow money through your employment?

A. Yes.

[63] Q. And who did you borrow it from?

A. Southern Pacific Credit Union.

Q. This is one of the benefits of your job?

A. Yes.

Q. Are you familiar with the term "bad order"?

The Court: Are you a member of the Southern Pacific Union?

The Witness: Yes, I am, as of a month ago.

The Court: Beg pardon?

The Witness: As of a month ago. Not any longer.

Mr. Engel: Q. You were up to a month ago?

A. Yes.

Q. Are you familiar with the term "bad order?"

A. Yes.

Q. And what does that mean?

A. Not to load the car.

Q. All right. And who—is there something physical that constitutes a bad order?

A. Yes.

Q. What is it?

A. A bad hitch.

Q. No, I mean, how do you know something is bad ordered?

A. Well, they got carmen to check the cars.

Q. And do they put a mark on the car or something?

A. Yes, put a bad order tag.

[64] Q. A tag?

A. Yes.

Q. It's like a cardboard tag?

A. Yes.

Q. And what's your understanding of what that tag means?

A. Don't load it or don't touch it.

Q. Okay. And who puts those tags on the cars?

A. They call them car whackers.

Q. Are these Southern Pacific employees?

A. Yes, they are.

[67] Q. So in addition to breaking the chains and unhooking the chains, you had to get the plates down so you could drive the cars off?

A. Right.

Q. And it was also your job, you four men, to lift the safety rails, if you saw fit, before you started working, is that correct?

A. Yes.

Q. Is that correct?

A. Yes.

[71] Q. Now, at the time of the accident, your immediate supervisor was a man named Dutch-Hauff, correct?

A. Pinkston.

[72] Q. Pinkston. Everett Pinkston, correct?

A. Yes.

Q. And Everett Pinkston was an employee of Pacific Motor Trucking Company, correct?

A. Yes.

Q. And you also took orders from "Dutch" Hauff?

A. Yes.

Q. And "Dutch" Hauff——

The Court: How do you spell his last name?

Mr. Corrigan: H-a-u-f-f.

The Court: All right.

Q. Is that correct?

A. Yes.

Q. And "Dutch" Hauff was employed by Pacific Motor Trucking Company?

A. Yes.

Q. And their superior was a man named George Hellwig, correct?

A. Yes.

[Continued on next page; nothing omitted.]

[73] Q. And he was employed by Pacific Motor Trucking Company, correct?

A. Yes.

[84] Mr. Corrigan: I will rephrase it, counsel.

Q. It's your understanding of the situation out there before 1963, going back into your memory as a working man out there, that you didn't take orders from Southern Pacific supervisors, you took from them from P.M.T. supervisors, isn't that correct?

A. Yes.

Q. All right. And apparently in the deposition that applied to Jarvis, an S.P. man, it applied to Schriber, an S.P. man, correct?

A. Yes.

Q. And the same thing was true, it applied to Holland, the S.P. clerk, correct?

A. Yes.

Q. And it applied to the car whackers, correct?

A. Yes.

[88] Q. But, in any event, it was your custom to take orders only from your own supervisors, right?

A. Yes.

Q. And your own supervisors would be P.M.T. supervisors, right?

A. Yes.

[96] The Court: Well, he means right after. In other words, you heard someone say Mr. Kelley fell, or something to that effect?

[97] The Witness: Right.

The Court: Then you saw Mr. Kelley there?

The Witness: Yes.

The Court: And the first two people to come up were Hauff and Pinkston, is that right?

The Witness: Besides the ones working on the trilevel.

The Court: Besides yourself.

The Witness: Yes.

The Court: Four of you all told. Then you say later others came, is that right?

The Witness: Yes.

Mr. Corrigan: Q. Do you know how much later it was the others came?

A. Five minutes, ten minutes.

Q. All right. But up until that five or ten minutes, the only people that were there being Hauff and Pinkston and you four teamsters, you would all have been PMT people, correct?

A. Right.

[108] Mr. Corrigan: Q. Now, when you fellows go on the piggyback ramp to unload piggybacks, you do that with the PMT tractors, is that right?

A. Yes.

Q. And is that the only tractor around there that, only company's tractor, that is, used to unload piggybacks?

A. Yes. Special tractors.

Q. Special tractor?

A. Yes.

Q. That fits the railroad car somehow?

A. No, raises and lowers the van hydraulically.

Q. I see.

[112] Q. I see. Now, the tools were supplied to you by the Pacific Motor Trucking Company?

Mr. Engel: Objection, Your Honor, without further clarification as to what he means by "tools." The question is vague and ambiguous.

The Court: Let's take the hammer. Who gave you [113] the hammer?

The Witness: We took it off the S. P. cars.

Mr. Corrigan: Q. Who gave you the ratchet?

A. PMT.

Q. And were you instructed to use the ratchet?

A. Yes, either the rachet or the hammer. Made no difference.

Q. Well, the rachet was designed to do the work, is that right?

A. Correct.

Q. And it was furnished by the Pacific Motor Trucking Company?

A. Correct.

[115] Mr. Corrigan: Yes, that's what I am talking about.

The Witness: After PMT found it was easier with the hammer, they gave us plastic hammers.

Mr. Corrigan: Q. Plastic?

The Court: What did they do?

The Witness: Plastic hammers.

The Court: They furnished you with hammers?

The Witness: Yes.

[119] Q. And at some time when you leave the tri-level with the automobile, you drive off of that edge down to the ground some way?

A. Correct.

Q. How do you get from the edge down to the ground?

A. They have a ramp.

Q. All right, and this is a moveable ramp?

A. Yes, it is.

Q. And you connect this ramp to the edge of the tri-level?

A. Yes.

Q. And then you drive the car off of it, or I should say the automobile off the railroad car, over this ramp, and down to the ground?

A. Yes.

Q. Now, with regard to the chains, I think you testified that these chains are attached and stay with the railroad car, isn't that correct?

A. Correct.

[122] A. Correct.

Q. Now, when I was asking you questions yesterday, Mr. Grimaddo, with regard to Mr. Jarvis and Mr. Hedland, Mr. Holland, Mr. Morse, and the heavy-set man with the cigar, and the problem you had with him—and Freddie, the car whacker—we talked about certain instructions and directions that you took from these people.

A. Correct.ect.

Q. You rec recall that. Now, can you tell me in your mind at the ti time what your reasons were for doing what these peo people instruct you or directed you to do?

A. Yes. Yo You had to do it one way of another.

Q. What do do you mean by that?

A. They asl ask you to do something, you wouldn't do it, they would uld go to my supervisor or he would tell him and my su supervisor would have to come back and tell me.

Q. All right ght, and did you feel that if you refused to do what the these S. P. personnel told you to do, that this could jeop opardize your job?

A. Yes.

[123] Q. M Mr. Grimaddo, in your experience while you were worki rking at this jobsite, this piggyback ramp area, you were ere aware of there being personnel there who had, in yo your opinion, anyway, job titles both relative to South thern Pacific and others with regard to Pacific Motor T r Trucking Company, is that fair?

A. Yes, sir, sir, yes, it is.

[124] The C Court: Let me ask you some questions. At the time thi this accident happened, did you have any doubt as to wh who Pinkston was employed by?

[125] The W Witness: No. I don't.

The Court: t: Did you have any doubt as to who Hauff was emp employed by?

The Witness ess: No, I don't.

The Court: t: Did you have any doubt as to who Holland was en s employed by?

The Witness ess: No.

The Court: Did you have any doubt as to whom—was it Pryal?

The Witness: George Pryal.

The Court: As to whom he was employed by?

The Witness: No.

The Court: Did you have any doubt as to whom Oosterbaan was employed by?

The Witness: No.

The Court: Did you have any doubt as to whom Kelley was employed by?

The Witness: No.

[126] Jarvis was employed by?

The Witness: No.

The Court: Did you have any doubt as to whom Mr. Hedland was employed by?

The Witness: No.

The Court: Now, there were also a couple of others. There was Freddie, a car whacker. Did you have any doubt in your mind as to who he was employed by?

The Witness: No.

The Court: And you also had in mind the man with the cigar?

The Witness: Yes.

The Court: Did you have any doubt, at least in your own mind, as to whom he was employed by?

The Witness: No.

The Court: What can you develop on that?

Mr. Engel: Did we mention Mr. Hedland?

The Court: How about Mr. Hedand?

The Witness: No.

Mr. Engel: Q. You have no doubt?

A. I have no doubt.

Q. All right. And who was he employed by?

A. Southern Pacific. And Mr. Schriber, I was never sure whom he was employed by.

The Court: Mr. who?

[127] The Witness: Schriber.

The Court: How do you spell that?

Mr. Engel: S-c-h-r-i-b-e-r.

The Court: What instruction did he ever give you?

The Witness: I can't recall offhand, but I know he told me to do something.

The Court: Did you obey him?

The Witness: Yes, as far as I know.

The Court: Why did you do it, if you tell me you don't know who he was employed by?

The Witness: He was either P.M.T. or S.P. I didn't know which one.

I knew at one time he worked for P.M.T., but I didn't know if he was still P.M.T. or S.P.

[131] Q. All right, and just generally how are they connected to the railroad car?

A. Well, they were chained to a fixed ratchet assembly on the floor of the railroad car, and you would take this ratchet and release the tension and go on to the next car, and then a man working with you as a partner would be following you on that side of the automobile, and he would take the chain, which was at that time slackened, and drop it to the floor of the car.

Q. All right. He would unhook it from the automobile?

A. Right.

[132] Q. All right. Before this process is begun of actually, you know, disengaging the chain, and even before **[133]** the chain is unloosened, is there another step that precedes that with regard to unloading the automobiles?

A. Well, yes. Yes, you'd have to put the keys in the automobiles that you were going to work on, drop the plates, and they have safety rail equipment that had to be raised.

[135] The Court: All right. Now, you say some of this work was done before you started loosening the chain, is that right?

The Witness: Well, that would depend, if I did it myself. I mean, sometimes if it was my job to do it, or if somebody else did it ahead of me, I took on the next job.

The Court: Well, was it an employee of P.M.T. that did all this?

The Witness: Yes.

The Court: He put the key in the car?

The Witness: Yes.

The Court: Lowered the window?

The Witness: Right.

The Court: And raised the safety rail?

The Witness: Right.

The Court: And lowered the plates?

The Witness: That's right.

[136] The Court: All right. Did the Southern Pacific employees ever do that, to your knowledge—as you recall it?

The Witness: Not while we were unloading automobiles. If they did, they did it to check the plate, or do some work on the car itself—the railroad car.

The Court: In the actual operation of unloading, this is something you or one of the men did with you did. To the best of your recollection, this is true, each day?

The Witness: That's right.

The Court: All right.

Mr. Engel: Q. All right, who was involved in the conversation that you either overheard or that was centered around where you were up there on the trilevel?

A. Well, Mr. Hauff or Mr. Pinkston were the supervisors on duty that day, and I know that either one of them or both of them were there with me, because they were giving me instructions to go along the top deck and check these railings and pull them up.

We started out with the car that the accident occurred on and then we went from there. But the conversation below me, from what I can remember it was about, was that, whose responsibility was it to put these safety railings up if they weren't in working order.

Q. All right, and what was said by the—the gist of what was said? Was one person saying it was the

other person's responsibility, or what was the gist of it?

A. Well, my supervisor asked me, Mr. Hauff or Mr. Pinkston asked me why I didn't put them up, and I said, "Well, there's times that they can't be put up; they are just not in working order." And he said you know, "What do you do **[144]** about this?

And I says, "Well, we have no other tools or anything to fix these things."

And then he asked the car mechanics why they didn't check these, and they said, well, they only checked the bottom part of the cars, the wheels or axles, I believe. They gave some other explanation. But they said they had no way of checking them unless they went up and pulled them up themselves. And then they continued to—I continued to walk down from car to car and check all these railings, and I believe it was Mr. Hauff, as we went along, said, "Well, look how many of them don't work."

Q. All right, but was there any conversation with regard to the fact that it was the car whacker's responsibility to do this?

Mr. Corrigan: I am sorry, do what?

Mr. Engel: Well, that's what I am going to ask him.

Q. There was discussion about the car whacker's responsibility with regard to the safety railings?

A. Well, the way I could answer that was, it was our responsibility to put these safety rails up, but it was not our responsibility to get them up if they

weren't in working order, or the cable was broken, or the hook was missing.

[147] Mr. Engel: Your Honor, are Exhibits 6 and 8 in evidence?

The Clerk: Yes.

Mr. Engel: Q. Now, you said something about something that would lead you to rely on the cable. What are you referring to?

A. Well, when you say the railing, I mean the cable itself.

Q. All right.

A. This is what makes the railings. Now, these poles, these upright poles that support the cable, they—like I said, it was sometimes you would see them up permanently, but the cable was not drawn. This is part of it, making sure the cables are good. Well, because of this hook thing or clamp that secured it after it went through the eye, and made it almost impossible to come out, if that was missing and somebody was walking from the other end of the car, which could have been seventy-five feet walking, relying on this railing and flexing and everything, the hook would rotate out, come out of the eye. The railing would just drop completely with the pressure of your hand or your body leaning against it, or whatnot.

Q. All right, and is it your opinion that that is why that railing was not up that day?

[148] A. Yes, sir.

[151] Q. And who was he employed by?

A. He was employed by the Southern Pacific Railroad.

Q. And would Mr. Holland on occasion give instructions to or tell you or other members of this crew things to do?

A. He has on occasion.

Q. All right, and did you people do it, as far as you knew?

A. As far as I know, when he asked me to, I did.

Q. All right. How about a Mr. Hedland? Know Mr. Hedland?

A. Yes.

Q. And do you know who he is employed by?

A. Best of my knowledge, Southern Pacific Railway.

Q. And did he have occasion to tell you or other members of your crew things to do?

A. Now, myself, no. I have talked to Mr. Hedland many times, but I can't remember him giving any instructions, myself.

Q. All right, have you ever had occasion to hear him or have knowledge of his giving instructions to other members of the crew out there?

A. Not to my memory, no.

Q. All right. How about—do you know a man named Jarvis?

A. Yes.

Q. All right, do you know who he is employed by?

A. Again, I believe the Southern Pacific Railroad.

Q. All right. And can you tell me, did you have occasion to see him out there?

A. Yes, quite often.

Q. And when you say quite often, about how often are you talking about?

A. Well, they had a program of shipping cars out of this San Francisco terminal here, and he was responsible for making sure they were tied down properly and according to the specifications, or whatnot, so no damage could occur to them during transit. And he would come down and handle this program, and we would work with him on it.

Q. All right, when you say you would work with him, what specifically would happen?

A. Well, he'd have diagrams and ideas on how to tie these cars down so they wouldn't become—you know, there was a certain amount of vibration and everything on the railroad car while it was going to its destination, and he wanted to make sure these automobiles didn't become loose and rub, hit each other and all this—to keep the claims down on them. And he had ideas and diagrams of how to tie them down. We executed them for him.

[153] Q. All right. In other words, did he tell you to do it certain ways and you would do it?

A. Yes.

Q. And did he physically participate with you in doing these things?

A. Yes, he was very concerned with the operation.

Q. All right. I mean, in other words, he would physically get onto the car with you?

A. I have seen him on the car with us at times, yes.

Q. Participating in hooking and unhooking an automobile or demonstrating that process?

A. That's right.

Q. All right. And in particular do you remember any piece of equipment that he used to carry around that the men referred to, in fact?

A. Yes, he carried a mirror. It was an extended mirror on a handle, sort of thing. And this way he could look underneath the car and the suspension, reflect where the chain was rubbing or was connected to.

Q. Okay, and he would show you how the chains were hooked under there?

A. Right. I believe he just used it so he wouldn't have to get down in his suit. We had coveralls, so we . . . .

[154] The Court: How long had you been working there in this capacity?

Mr. Engel: You mean up to the time of the accident?

The Court: Yes.

The Witness: Three years.

The Court: All right.

Mr. Engel: Q. And can you tell me, what did Mr. Jarvis call you?

A. Well, he knew me by my first name, Connie.

Q. All right, and about how often would you say you saw him?

A. When this program started down there, we saw him daily.

Q. Okay.

A. And I can't tell you exactly from memory how long a duration it was, but . . .

Q. All right, now, in doing this with you, did he ever say anything to you with regard to the railroad?

A. Well, he would tell us that they were having a probem when these cars got to the destination with damage to them, and they believed it was due to the way they were tied down. And when he came along with these diagrams to show us what they had in mind to secure them that way, he'd say, you know, this is what the railroad wants **[155]** as far as they want these shipped.

Q. All right. Now, how about a Mr. Schriber? Know who he is?

A. Yes.

Q. Do you know who his employer was?

A. Again, I believe it was Southern Pacific, as far as I knew.

Q. All right. And did you have occasion to see him down there?

A. Yes, he was down there more than once.

Q. All right. How often was he down there? How would you describe his being down there?

A. Well, he was more attached to the van piggyback service, which was right in this yard, and they were always trying to improve their loading operation on the mechanics of how it was loaded on a car, and whatnot. And he would come down to see the demonstration. For instance, a new truck would come out, or something to do this, so he would come down and observe.

Q. All right. Now, would he do like Mr. Jarvis, and physically get up and participate with the employees on the hooking and unhooking, showing you how this was to be done, as far as your seeing?

A. As far as my memory, no. I know he was a close as the—I would say the grease or dirt would allow you, **[156]** know.

Q. All right. And did you have occasion to work with him yourself before?

A. Yes, when I was over on this type operation.

Q. And he would ask you or tell you to do things?

A. Yes.

Q. All right. And you would do them?

A. Yes.

Q. All right. Did he also say anything about what the railroad wants?

A. Well, I can't remember word for word he said it that way, but, "This is what we would like to do on this. This is what we would like to try."

Q. Now, have you ever had occasion to see any other S.P. employees come down there en masse—in other words, more than one, or a group of them, on any occasion?

A. Yes.

Q. All right, can you tell me what you have seen?

A. Oh, I'd see a couple there, company automobiles arriving with these gentlemen, which you—you only took for granted they were working for the railroad.

Q. You say you did take that for granted or—?

A. You just took that for granted. And they would come down and observe some type of operation,

whether it was a piggyback or some car that might have been put in there on [157] a siding for them to examine in some way.

Q. All right, and how many have you seen on accasion, in numbers?

A. Oh, as many as, I'd say, twelve. A dozen.

Q. Now, have you ever had occasion to get a free pass on the railroad?

A. Yes, I did once.

Q. All right, and how did you get that?

A. I requested it through the office, to take my family to Disneyland.

Q. When you say "the office," what is that?

A. The office in our terminal there on Sixth Street.

Q. And is that office still there?

A. Yes, it is.

Q. Have you seen any pictures of it lately?

A. Yes, I have. There's one right there.

The Court: Is that the S.P. office or your office you are talking about?

Mr. Engel: Q. What are you referring to when you say it's right there?

A. Well, here it is. It was at an angle of this yard that we had—the piggyback.

Q. All right, could I ask you to put an arrow pointing to that place?

[158] The Court: Whose office is this, P.M.T. or S.P.?

The Witness: It was a P.M.T. office where we . . . .

Mr. Engel: Q. Can you just put an arrow pointing to it, please? Put the point coming down from the top.

A. Okay. [Marking]

Q. And show you Plaintiff's Exhibit No. 5, the top photograph on there, is that the same building you are referring to?

A. Yes, that's it.

Q. All right, and what does that building say on the side in large letters?

A. Says "Southern Pacific."

Q. Now, just briefly, if you could, look through those five photographs that are marked Plaintiff's 5. Can you tell me what those photographs are of, generally?

A. This is of the main terminal that we had here in San Francisco.

Q. Is this in the general area where you worked?

A. Yes.

Q. Can you tell me what your check said that you received around the time that this accident happened, as to who it came from?

A. Had "Pacific Motor Trucking" on the top, large letters.

Q. Say anything about "Southern Pacific" on it?

[159] A. Yes, it had "Solely owned subsidiary of Southern Pacific," I believe.

[160] Mr. Engel: All right.

Q. Mr. Oosterbaan, let me ask you this. From time to time while you were down there, in your experience with regard to yourself or with other members of the crew down there, would you have occasions where you might, you know, sneak a break when you weren't supposed to, or something like that, to have a cigarette or just a chat or something?

A. Oh, yes,

Q. All righ[t]es, I'm sure that happened.

would [161] yo[u] right. Now, when you were doing that,

you know, thou[gh] you say that you were, there was some,

caught taking a[ny] thought given or concern given as to being

A. Sure, th[ere] ng a sort of improper break?

Q. All right there was a lot of concern.

you tell me, di[d] ght. Now, when you had this concern, can

caught by S.P. did you have concern that you would be

The Court: S.P. people or P.M.T. people?

The Witness t: How about Mr. Hellwig?

The Court: ess: Oh, he had some influence there.

would concern t: He had some influence there? That

The Witness rn you, wouldn't it?

The Court: ess: Sure would.

The Witness t: Mr. Pinkston?

The Court: ess: Yes, it would.

The Witness t: Mr. Hauff?

The Court: ess: Yes, it would.

The Witness t: Mr. Holland?

The Court: ess: It would, too.

The Witness t: All right. Mr. Schriber?

The Court: ess: It would.

The Witness t: Hedland?

too, you would ess: Yes. But I would have to say that,

what kind of a uld take into consideration the personality,

The Court: f a person the boss was.

[162] The W t: Yes.

The Court: e Witness: Or the man was.

The Witness t: Who did you consider the boss?

visor the boss. ess: Well, I considered my P.M.T. super-

The Court: ss.

t: Mr. Pinkston and Mr. Hauff?

The Witness: Right.

The Court: How about Mr. Hellwig, did you consider him being superior to them?

The Witness: Sure did.

The Court: All right. Well now, of all these people that you name, who would you consider the basic, your basic authority, the man you would obey?

Mr. Engel: Well, Your Honor, if I may object to your question?

The Court: Yes.

Mr. Engel: "Basic" is ambiguous.

The Court: All right.

Mr. Engel: And also I don't think this question is one of exclusiveness. In other words, the Court's question——

The Court: Oh, I recognize it's not one of exclusiveness, but nevertheless it is very relevant and material.

Mr. Engel: Well, certainly, Your Honor. But it could mislead the witness, too.

The Court: Well, I have asked him all the names. **[163]** I am satisfied with the questions I have asked, and I am making no observation with relation to the consequence or effect or the weight of the answers given.

Mr. Engel: All right.

The Court: All right.

Mr. Engel: Q. Now, do you know, are you familiar with the term "bad order"?

A. Yes.

Q. All right, what does that mean?

A. Well, when that was put on a piece of equipment, the equipment wasn't allowed to be used for loading or to be moved.

Q. All right, now, was there some physical designation that was attached to—strike that.

This term "bad order," this applies to the railroad cars down there?

A. Well, it also applied to trailers and tractors we drove.

Q. Okay, and was there something physically attached to the equipment that would make it a bad order?

A. It was a bad order sign.

Q. All right, and this was attached to railroad cars also?

A. Yes, it was.

Q. And who put it on the railroad cars?

[164] A. The mechanics for the railroad.

Q. Meaning who?

A. Well, any mechanic could put it on.

Q. All right.

A. For the railroad.

Q. And if that were—did this say—strike that. Did these individuals ever tell you then to, like, not a work car because it was bad ordered, or anything like that?

A. Yes, they advised us of the bad order.

Mr. Engel: All right.

The Court: What did the bad order mean to you, that you should or should not do?

The Witness: Well, in regard to the railroad, if I saw a car that was bad ordered, a railroad car, re-

gardless if it was loaded or empty, but I was going to do something with it, I wouldn't touch it until I found out.

The Court: All right.

Mr. Engel: Q. And who would you find out from?

A. Well, if the mechanics were right there on the track, I would ask them.

Q. All right, with regard to the automobiles themselves that would go on the tri-levels, were these automobiles inspected before they would get on the tri-levels?

A. Yes.

[165] Q. And was some mark made on the automobile that would indicate that it had been inspected?

A. Well, when it first started, we had to go find the clerk that was checking them in. This was a pretty large lot, there was a lot of walking done. So if you could save yourself a few steps, you would figure out between your own people some way of telling you this. So we started, this clerk would start marking windshields of the ones that were okay, so as you came down from the train you could grab an automobile and drive it up and load it.

Q. Now, when you say it was okay, it was okay for what?

A. It was okay to load, because it had been checked.

Q. All right, and before the markings were put on the window, how did you find out if it was okay to load?

A. You just asked him.

Q. And who would you ask?

A. The clerk that was checking.

Q. Who was his employer?

A. The railroad, Southern Pacific.

Q. All right. In other words, you would have to get approval from him before you could put the car on the tri-level, or the automobile on the tri-level?

A. Well, like I said, he was right there and he was the man that was responsible for it, so you just ask him.

[166] Q. All right, but what I am driving at is, you couldn't put it on until you obtained that information from him?

A. That's right.

Q. All right. Did you ever have occasion where you would be standing around and it appeared you weren't working, and the reason you weren't working was because these cars had not been checked, and somebody would ask you why you were not working?

A. Yes.

Q. All right, and——

A. This has happened.

Q. What would you say to him?

A. Well, we would say the cars either hadn't been inspected, the automobiles hadn't been inspected, or the railroad cars hadn't been inspected.

Q. All right. So either or both, it was the automobiles or the railroad cars themselves, you would have to sort of get an okay from the railroad before you could perform this job of putting the automobiles on the tri-levels?

A. Yes. But it wasn't completely our responsibility. For instance, like I said, if the man was right

there, you asked him. But sometimes my supervisor might come down and say, "They are all right to load."

[170] The Court: All right, I would like to ask just a couple of questions now.

Mr. Oosterbaan, you testified that before starting the operation of loosening the chains, which Mr. Kelley would unhook, that you would put the key in the automobile, raise the window, put down the plates, is that right, and raise the safety rails? Is that right?

The Witness: That's right.

The Court: Now, raising the safety rail meant seeing that the posts or stanchions had been raised, that the cable ran through the eye, that it was properly hooked and secured?

The Witness: That's right.

The Court: Is that right?

Now, you did this, you and one of your crew did this every time, is that right?

The Witness: Not myself, but two people.

The Court: Two of you.

The Witness: Somebody from the crew did that.

The Court: Somebody from the crew. And you are talking about a P.M.T. crew now?

The Witness: Right.

The Court: One of you did that, or one or more of you did that, is that right, each time?

The Witness: Yes, sir.

[171] The Court: Now, do you have any recollection as to this specific morning, as to who did it?

The Witness: No, I don't.

The Court: All right. Now, you say one or more of you did it. Did Southern Pacific employees do this job of raising the poles and testing the cable?

The Witness: No.

The Court: It was always one of you gentlemen?

The Witness: [Nodding head.]

[173] Q. Now, did you have a rachet assigned to you by the P.M.T.?

A. No, they were in a tool box that we just went and got and used them.

Q. A P.M.T. box?

A. Right.

[174] Mr. Corrigan: Now, Mr. Clerk, do you have the ratchet that the man gave you yesterday?

The Crier: It's underneath there (indicating).

The Court: Does he have what?

The Crier: There it is. Underneath here (indicating).

Mr. Corrigan: Oh, I have it.

Q. Now, is this what the P.M.T. gives you to break loose the thing that's holding the chain?

A. Right.

Q. This is what you were using?

A. Yes.

[180] Mr. Corrigan: Q. All right, Mr. Oosterbaan, yesterday when we recessed, we were talking about the rachet device, and I just want to ask a few more questions about that procedure and go on to something else.

The rachet was the normal tool used to loosen the chain with, is that correct?

A. That's right.

Q. Now, from time to time the chains that were attached to the rachet would become kinked, I take it, so that they wouldn't be perfectly straight?

A. Yes. This wasn't uncommon.

Q. And that would cause the mechanism that you were to release to bind in some way, is that correct?

A. That's right.

Q. And so on those occasions you might hit the chain with a hammer to unkink it, so to speak, is that so?

[181] A. That's right.

Q. So we have it straight, on the day in question, when the accident happened, your best recollection is that you were using the rachet wrench that I showed you yesterday?

A. The best as I can remember, yes.

Q. And I may have misled the record a little bit. The device I showed you that was identified yesterday was what is known as a rachet wrench with extension, is that correct?

A. Yes.

Q. And the rachet itself is actually the device that is a part of the railroad car?

A. Right.

[188] Q. With reference to the days and weeks before the [189] accident—understand?—at the place where the accident happened, the only Southern Pacific personnel who worked in that area, that immediate area, would be Mr. Holland, Mr. Teijeiro and Mr. Graham, right?

Mr. Engel: Objection again, Your Honor. When he's talking about work, that calls for a legal conclu-

sion. If he is talking about, did he see other people there and it appeared they were performing functions, he can testify to that. But the opinion with regard to work is a legal conclusion.

The Court: Well, I don't know.

Mr. Engel: He has already testified as to several other people that were down there all the time, or often, anyway.

The Court: You want to read the question, please?

[Question read.]

The Court: All right, do you know of any others who worked in that area?

The Witness: Not on an everyday basis.

The Court: All right. Then those are the men who worked on an everyday basis?

The Witness: Those are the men I saw every day, I am sure.

The Court: All right.

[193] Q. Now, with reference to the time of the accident, just after it occurred, you do not recall, do you, any Southern Pacific employees being there at the scene?

Mr. Engel: This is at what time?

Mr. Corrigan: At the time of the accident, when it occurred.

Mr. Engel: The moment it occurred?

Mr. Corrigan: The moment it occurred and for a time thereafter.

A. At the moment it occurred there was no S.P. employees that I remember seeing.

[198] Q. Okay. Now, do you recall that there was a booklet that was—you have seen a booklet that has

been printed up pertaining to the loading and unloading of automobiles?

A. Yes.

Q. All right, and do you remember who put that book out?

A. It was the Southern Pacific Railway.

Mr. Engel: May we have this marked as Plaintiff's next in order, Your Honor?

The Court: Yes.

The Clerk: Plaintiff's Exhibit 10 marked for identification.

[Document described below was marked Plaintiff's Exhibit 10 for identification.]

Mr. Engel: I will just offer it in evidence.

[203] The Court: All right, okay. I am just off the record now.

[Colloquy off the record.]

Mr. Engel: Your Honor, if I can, I would like to call the Court's attention particularly to certain portions of that, if I could.

The Court: All right. This is going to be all subject to motion to strike.

Mr. Engel: Starting out, it's entitled "Introduction."

"The automobile or truck temporarily entrusted to your care and handling is a complex machine worth on the average of $3,000 to $6,000. Countless hours of engineering design and construction skill have gone into making it an attractive, durable piece of equipment, designed to serve——"

The Court: All right, this must be all pre-Nader.

[Laughter.]

The Court: Go right ahead.

Mr. Engel: "—designed to serve and satisfy its purchaser. The least carelessness can result in damage to the vehicle and thus reduce its value and utility, as well as result in a costly damage claim. This causes dissatisfied customers for our company and the automobile manufacturer. Excess **[204]** speed damages engines, transmissions and tires. Tie down hooks and chains improperly applied crack and rupture the frame. Forgotten tools in pockets cause scratches and dents. Doors opened carelessly chip paint. The aim of this booklet is to help you do a better job of handling motor vehicles and thereby reduce damage. We ask you to read and understand a few simple rules presented here, but there is no need to memorize them. In fact, almost everything in this book can be summed up in these few words: Treat every vehicle you handle as if you had just purchased it."

That's the introduction, Your Honor. Then on Page 2 of the booklet under the caption of "Safety," the subcaption is: "Safety of Personnel and Equipment Must Be the First Consideration. Authorized signs reading 'employees working,' white lettering on red background, must be placed at the end of the last rail car before loading or unloading crews start work on each track. Sign must be removed after work is completed and cars ready for movement. White light is to be attached to this sign when used at night. Raise safety rail before working on top deck of rail

cars. Do not exceed five miles per hour when driving on rail cars and twenty miles an [205] hour in parking areas. Spring action resulting from excessive speed on rail cars can damage tops and underframes of vehicles. Slower speeds must be observed when necessary for safety. When it is necessary to ascend or descend ladders on rail car, always face the car. Watch your step at all times when on or around cars and transports. Never throw tools from decks of rail cars or transports to the ground. Make sure bridge plates are raised and locked before rail car is moved."

And over on Page 9 under the caption of "Unloading:"

"When unloading, observe the safety and general rules in the front part of this booklet, being particularly careful to avoid possible roof and underbody damage when driving through rail cars. Always use seat and floor protectors. Park vehicles carefully, closing hoods, deck lids, doors, windows, heater vents and door vent windows, and turning off electrical accessories and lights. Use only wrenches furnished to release rachets. Hammering on rachet assemblies as an expedient to release chains is prohibited. Hooks must be removed from vehicles by hand."

The Court: By the way, aside from that booklet, were those the instructions you had received in the course of [206] your employment?

The Witness: Yes.

The Court: Did he read anything that was not an instruction you had already received?

Mr. Engel: "Already" meaning what?

The Court: Received or informed by some source.

Mr. Engel: You mean before he saw the booklet?

The Court: Did someone ever give you instructions of this character? We will find out who.

The Witness: As far as somebody in the company showing me exactly how to do the operation, I never was instructed.

The Court: All right.

The Witness: Never saw anything written on it.

The Court: Did someone give you instructions with relation to safety and speed of travel and use of the cars and things of that sort?

The Witness: Never.

The Court: Never did?

The Witness: Never.

The Court: But you had seen this booklet?

The Witness: I have seen it. It came out in my mailbox with the company.

The Court: And that's the first time that you received the equivalent of instruction, regardless of source?

[207] The Witness: Right.

The Court: With relation to five miles an hour on the cars, twenty miles an hour on the lot and the springs?

The Witness: That's right.

[210] Q. All right. And you have had occasion to take it off?

A. Many times.

Q. Okay. And did you ever have occasion to have an S.P. switchman tell you to take that flag off?

A. So they could pull the train?

Q. Right.

A. Yes.

Q. All right. And you would do that?

A. Yes.

Q. Okay. Did you ever have occasion for them to tell you to put one on? In other words, the cars would be in there and there wasn't any flag out?

A. No, not to my knowledge, on putting them on.

[213] Q. All right. Did you find working down there that even if the S.P. personnel were not giving you instructions directly, that you and the other members of the crew down there were aware of the fact they were communicating to your supervisors for the purpose of getting you to do things?

A. In the job we had, it was almost always that way.

Q. All right. And did you also—you, and as far as you know, the other personnel working down there—were you of the opinion that if they came up to you and asked you to do something, that if you didn't do it, you knew they were going to tell your supervisor to get you to do it anyway?

A. Can I have that question again, please?

Q. You fellows that worked down there on this crew, were you aware—you, personally, and as far as you know, the other members of the crew—that if the S.P. personnel asked you or instructed you or requested you to do something, **[214]** that if you didn't do it, they would just go to your supervisor and get him to tell you to do it anyway?

A. Yes, that probably would be the alternative.

The Court: Let me ask you a question. Was that particularly significant? You knew what your job was, didn't you?

The Witness: That's right.

The Court: And if an S.P. man told you to do something that wasn't in your job, what you did routinely and regularly, would you do it?

The Witness: I'd have to evaluate how out of the way of my line of work it was.

The Court: Yes.

The Witness: You know, if it were something that——

The Court: If it was something in your line of work you would do it, and all you would be accepting was a suggestion, it that right?

The Witness: I would do it, I would do it.

The Court: Something you would be prepared and willing to do even without a suggestion?

The Witness: That's right, it was all work.

The Court: Well then, the work, the routine—the nature of the work was such that you didn't require very much instruction, did you?

The Witness: No.

[216] Q. Unfortunate souls hanging around there. If they came up and asked you to do something, would you do it?

A. No.

Q. All right, how about if you had a teenage kid come in there, about fourteen years old, and he asked you to do something, would you do it?

A. No.

Q. How about a girl of about twenty-five—I will take that one back.

How about an older lady, or one who you physically didn't think was interesting; if she asked you to do something, would you do it?

A. No.

Q. All right. If somebody came down there that you recognized was not an S.P. personnel, would you do it? Say a man showed up with an ice cream truck?

A. No, I wouldn't.

Q. All right. Now about somebody who showed up and he obviously had some insignia on him that somehow showed that he wasn't an S.P. man, like a gas station uniform or a postman or anything like that? Would you do it?

A. No.

Q. So when these people asked you to do something, you recognized that they were Southern Pacific personnel, isn't that right?

[217] A. Absolutely.

Q. And that's why you did it?

A. That's right.

[232] Q. And where were you, specifically, when the accident happened?

A. I was about 400 feet from there with my partner, Manuel Teijeiro, and the foreman, James McTernan.

[233] Mr. Engel: Q. What was your first awareness that an accident had happened?

Or let me ask it this way: You did not see the accident happen?

A. No, I did not see the accident.

[234] Q. What was your first awareness that an accident had happened?

A. We saw the ambulance backing up in the distance, and we figured there was an accident somewhere.

Q. All right, and so what did you do?

A. We walked over towards it.

Q. And did see Mr. Kelley?

A. There was a crowd around this particular area and Mr. Kelley was there, yes.

[263] A. Yes, sir.

Q. May I see them, please?

Have you reviewed these documents?

A. Yes, sir.

Q. And do you know anybody else that's reviewed them?

A. Yes, I believe possibly Mr. Edwards.

Q. How about Mr. Corrigan?

A. Mr. Corrigan? Yes, I believe he has, sir.

Q. All right. How about Mr. Roy?

A. I assume he has, too, sir.

Q. Those two gentlemen are the two attorneys here?

A. Yes, sir.

Q. For Southern Pacific Company?

A. Yes, sir.

Q. You gave them authority to inspect it?

A. Yes, sir.

Q. And how did they know that you were going to bring these documents with you?

A. How did they know, sir?

Q. Right.

A. I was served a subpoena as I was leaving my office last Friday night, and I immediately contacted Mr. Corrigan about it.

Q. Why did you immediately contact him?

[264] A. I beg your pardon?

Q. Why did you immediately contact him?

A. Because I knew he was the attorney in the case.

Q. For who?

A. For the Southern Pacific Company.

Q. Were you instructed that you were to contact him?

A. No, sir.

Q. Well, how did you even know who he was?

A. Well, he is a member of the—that is, of the company's law department, of the Southern Pacific Law Department.

Q. I notice there are a lot of documents in here signed, or appear to be copies of documents signed by Mr. Corrigan, is that correct?

A. Yes, sir.

Q. Is it customary for you in files that you have to receive copies of material that Mr. Corrigan has issued?

A. Yes, sir.

[268] Q. Now, before your deposition was taken, did you have a conference with the Southern Pacific attorneys?

A. Did I have a conference?

Q. Did you talk to them ahead of time about your deposition?

A. Yes, of course I did, certainly.

Q. And was this at your request or——

A. Beg your pardon? Mr. Roy at that time was our attorney, P.M.T. attorneys.

Q. At the time of your deposition?

A. Yes, sir.

Q. And since that time he's become a Southern Pacific attorney?

A. Well, he could be both under certain circumstances.

Q. Well, what you are saying, then, is when he asked you to come to his office before your deposition, you understood him to be a P.M.T. lawyer?

A. Yes, sir.

Q. Do you know if he'd been a Southern Pacific lawyer before that?

A. Yes, he had.

Q. Had he been a Southern Pacific lawyer after that?

A. I presume so, yes.

[278] A. Have I ever had one, sir?

Q. Yes.

A. Yes, sir.

Q. And how long have you been working?

A. Thirty-six years.

Q. And do you have a free pass now, after ten years with the railroad?

Yes, I do.

Q. All right. That's with the—you receive that through your employment?

A. Yes, sir.

Q. And who do you work for?

A. I work for Pacific Motor Trucking Company.

[281] The Court: What do you mean by that, more apparent?

Mr. Engel: Your Honor, I will use it in argument, and I will argue about it. I think there was something that was significantly shown by Mr. Calkins that does have relevancy, and a great deal of materiality, to this case.

The Court: You mean that he went to lawyers for the Southern Pacific and responded to their directions?

Mr. Engel: Well, that would be part of it, Your Honor. I am not saying that it is——

The Court: I have very substantial difficulty, very frankly, I say again, in finding anything of any real relevancy here except possibly the fact that he had a free railroad pass—which may be more indicative of a relationship between P.M.T. and the Southern Pacific than all the rest of the stuff that you made any reference to.

Mr. Engel: All right. Well, Your Honor, what I was alluding to was that to a jury as a trier of fact, and who did not have the same sophistication that the Court does, until the end of the interrogation of Mr. Calkins, I think it would have been highly confusing as to "who he works for." It wasn't until the end that I asked him who he worked for, and up until that time it seems to fluctuate back and forth.

[282] By Mr. Corrigan:

Q. What is the title of your office?

A. I am manager of safety and personnel.

Q. With Pacific Motor Trucking Company?

A. Pacific Motor Trucking Company.

Q. When did you come to work for that company?

A. 1934, about this time in '34.

Q. What year was that company formed?

A. 1930, I believe it was.

Q. And has it been in the trucking business, to your knowledge, ever since?

A. Yes, sir.

Q. To your knowledge, has it always been a wholly-owned subsidiary of the Southern Pacific Company?

A. It has that.

[283] Q. Now, does your company own trucks and tractors?

A. Yes, sir.

Q. Now, a few preliminary questions. How many trucks does your company own?

A. Approximately sixty-five hundred.

Q. Six thousand five hundred?

A. Yes, sir.

Q. And in how many states does your company operate?

A. Seven.

Q. The Western states?

A. Yes, sir.

Q. How many employees does your company have?

A. Approximately four thousand at this time.

[284] The Court: You said in a number of states, is that right?

The Witness: Yes, sir.

The Court: You operate in the State of Washington?

The Witness: No, sir.

The Court: All right. You operate in the State of Oregon?

The Witness: Yes, sir.

The Court: All right, go ahead.

[286] Mr. Corrigan: Q. Now, Mr. Calkins, at the time of Mr. Kelley's accident, was there in effect a collective bargaining agreement which affected the men in Mr. Kelley's capacity, and other teamsters working for the Pacific Motor Trucking Company in the City of San Francisco?

A. Was there a contract?

Q. Yes, sir.

[287] A. Yes, there was.

Q. All right. Now I want to show you a little booklet and ask you if that was the contract that was in effect between Pacific Motor Trucking Company and——

A. It was during the period of 1961 or 1964.

Mr. Engel: Your Honor, may I object to the question before the answer gets in? I don't see the relevancy of that either.

Mr. Corrigan: I will point out the relevancy.

The Court: What is the relevancy of the contract?

Mr. Corrigan: Right directly on the question of control, if permitted to produce this.

The Court: In other words, your theory is the bargaining would be with Southern Pacific and not with P.M.T.?

Mr. Corrigan: No, my theory is that the collective bargaining agreement, if admitted in evidence, will show that the Pacific Motor Trucking Company nego-

tiated a contract which dictated to Pacific Motor Trucking Company under the terms of the agreement how their employees in some ways would be controlled, and by whom, on the piggyback ramp in San Francisco where this accident occurred, on the date of the accident.

The Court: All right, well, I think if that's the purpose, I think it is admissible.

Mr. Engel: All right, Your Honor. I would object [288] to Mr. Calkin's interpreting the contract, though. I think the document speaks for itself.

The Court: Well, that's fair comment.

Mr. Corrigan: Let's see how far we get.

Q. Mr. Calkins, is that the collective bargaining agreement between Local 85 and the Pacific Motor Trucking Company?

A. Yes, sir, the entire industry as well.

Q. Now, when you say the entire industry, that involves other trucking companies and Local 85?

A. Yes, sir.

Q. Just so we will have some understanding, name two or three who might also come under it.

A. P.I.E., Delta Lines.

Q. These are other truckers?

A. Yes, sir.

Q. All right. Now, does that contract have in it, as of the date of this accident, a provision for conduct at piggyback ramps?

A. Yes, sir, it has a piggyback provision in it.

Q. All right. Now, on what page does the piggyback provision, where do you find it?

A. It's on Page 23.

Q. Now, with reference to he piggyback provision . . . May I see that, sir?

[289] Mr. Engel: May I see it before we go into it? [Colloquy between counsel out of hearing of the reporter.]

Mr. Corrigan: Q. By the way, Mr. Kelley was a teamster, is that correct?

A. Yes, sir.

Q. Came under the provisions of this collective bargaining agreement?

A. At that time he did, yes.

Q. By the way, do your labor relations, so far as you understand them—do you ever get involved in labor relation matters?

A. Frequently, sir.

Q. Is it your understanding that your company, from past experience, from your direct knowledge—things that have happened in the way of labor strife—you come under the National Labor Relations Act, do you understand that?

A. Yes.

Q. All right. Now I want to refer you to this agreement that was in effect at that time, and the piggyback, Article 9, commencing on Page 23.

The first subheading under "Piggyback," under Article 9, is sug(a). Would you read that, please? Just read it exactly as it is.

A. "There shall be no accident letter for piggyback **[290]** unless negligence is proved on the part of the employee."

Q. All right, now, what is an accident letter?

A. Well, it's a warning letter, it's a letter of instruction, it's a letter of reprimand, if you wish to call it that.

Q. All right. Now read sub-paragraph (b), please.

A. "Rain gear, overalls, gloves and protective clothing shall be furnished by the employer and shall be maintained at the expense of the employer."

Q. That's Pacific Motor Trucking Company?

A. Yes, sir.

Q. And has it been your experience that you are required out there to furnish that gear to those men?

A. Yes, sir.

Q. Now with reference to sub (c), please read that.

A. "Any unsafe conditions in tri-level and bi-level will be corrected immediately."

Q. Now, this is not an agreement that involves any railroads, is that correct?

A. No, sir.

Q. All right. Now, I want you to read slowly and very clearly sub (d).

Mr. Engel: I am sorry, could I——sorry. Could I get the last answer before he started that?

[291] The Court: Yes, the last answer was that this agreement is not an agreement that involves any railroad.

Mr. Corrigan: Q. Now take your time and read sub (d).

A. "Only direct representatives of the employer may give orders to employees covered by this agreement."

Q. The employer being the Pacific Motor Trucking Company?

A. That's correct, sir.

Q. Now, was this an agreement that was negotiated between the Teamsters Union and the representatives of the Pacific Motor Trucking Company and other carriers?

A. And other carrier. The California Truck Owners Association is our bargaining agency.

Q. Now read sub (e).

A. "Sub (e). In the loading and unloading of trailers from rail cars, there shall be at least two men in the crew at all times."

[304] Mr. Corrigan: Q. Now, when vans, say at the piggyback ramp in San Francisco in 1963, are put on the flatcars or taken off, is that with aid of a tractor?

A. Yes, sir.

Q. And are those tractors special in any way, specifically designed to suit those needs?

A. They are.

Q. And who's the owner of those tractors?

A. P.M.T. Company.

Q. Now, when did this whole piggyback business start, about what year?

A. Around 1950.

Q. And at that time was the Pacific Motor Trucking Company in the automobile carriage business?

A. Yes, sir.

Q. Did they at that time have employees trained to move automobiles?

A. Yes, sir.

Q. To place automobiles on carriages?

A. Yes, sir.

[307] The Court: All right, let me ask this. P.M.T. had been in business for many years?

The Witness. Yes, sir.

The Court: Tri-levels didn't come along until 1950, is that right?

The Witness: No, tri-levels came along in the early Sixties, sir.

The Court: Early Sixties?

The Witness: Or mid-Sixties.

The Court: All right, mid-Sixties. Starting in 1950 you were making multiple deliveries by multiple deck trailers, is that right?

The Witness: 1937, sir.

The Court: That's when that started?

The Witness: Yes, sir.

The Court: And P.M.T. was engaged in that practice ever since?

The Witness: Yes, sir.

[308] The Court: And it had been with knowledge of the method of loading and unloading these types of carriers?

The Witness: Yes, sir.

The Court: All right.

Mr. Corrigan: Q. Now, did you have a force of men who would unload these highway auto carriers that were carried on railroad cars before the tri-level?

A. Yes, we did.

Q. Now, when the tri-levels came along, was that force used to unload tri-levels?

A. For the most part.

Q. And did you develop equipment to unload tri-levels?

A. Yes, we had to, sir.

Q. And did your company enter into a contract with the Southern Pacific for the unloading of piggybacks and tri-levels when they developed?

A. Yes, we did.

Q. And after this contract was signed, did you continue to utilize this force that you have previously had to unload and move the highway auto carriers?

A. Yes, we did.

[309] A. On a unit basis, I believe that's it, yes.

Q. In other words, is it so much an automobile?

A. So much an automobile.

Q. Piecework basis?

A. That's what it amounts to.

The Court: Well now, let me find out something.

Mr. Corrigan: Yes, sir.

The Court: You are paid on a piece basis for the number of cars unloaded?

The Witness: Yes, sir.

The Court: Well, who subsequently delivers these cars to the ultimate destination?

The Witness: We do, sir.

The Court: And how are you compensated for that?

The Witness: By the tariff in that respect. And now we are getting into an area that I am not totally familiar with, sir.

The Court: All right, but just so that I understand, you may correct me, you are telling me that the company is paid on a piece basis for unloading and it's paid an additional tariff for delivery?

The Witness: Yes, sir.

[311] Mr. Corrigan: Q. Now, did you also, at the time Mr. Kelley was hurt and prior to when he was hurt, utilize [312] men, including Mr. Eugene Kelley, for drive-away delivery to dealerships, automobile dealerships?

A. We did this for some time, yes sir.

Q. All right, and by drive-away—explain to the Court what I am talking about.

A. Well, individual automobiles would be driven to a dealership.

[314] The Court: Oh, I think the quickest way to do it is to get back to 1963.

Mr. Corrigan: All right.

The Court: At the San Francisco yard, the scene of this accident. Do you know whether any companies other than P.M.T. did the unloading?

The Witness: In San Francisco?

The Court: Yes.

The Witness: No.

The Court: They did not? All right. Now, do you know whether any other companies made car deliveries?

The Witness: Yes, sir.

The Court: All right. Now we get back to the question of charging that I have before me.

Mr. Engel: Your Honor, if I may, the question meaning: Made deliveries from that yard?

The Court: Yes, from that yard, automobile deliveries from that yard—any other truckers. If you know.

The Witness: Yes, I'm quite sure of this.

The Court: All right, now, do you know whether the unit charge of unloading those trucks was a unit charge made by the—unloading was out of it? Unit charge made by P.M.T. and a delivery charge a separate charge made by the [315] other?

The Witness: By an outside carrier?

The Court: Yes.

The Witness: We were compensated for our unloading of the automobiles and grounding them.

The Court: Yes.

The Witness: And then they become someone else's responsibility to take them to destination.

The Court: All right.

[322] Mr. Corrigan: I understand. All right, let me . . . . I have here a certified . . . . You may have the same ruling with reference to this. I have here a certified file from the Workmen's Compensation Appeals Board which has been certified by that body as being their file, and it includes signed statements and applications by Mr. Kelly himself.

I would like to offer this entire document in evidence on the limited question of——

The Court: What does he say?

Mr. Corrigan: He said he was an employee at the P.M.T. when he filed with the Workmen's Compensation Appeals Board, as did his attorney.

Mr. Engel: Your Honor, I can——

The Court: Well, that much is material.

Mr. Engel: All right, could we also have that marked for identification, Your Honor? There are cases that I believe hold that the determination, if

there is a determination, or the application, or the IEC proceedings, are not controlling in any case with regard to the issue that's before this Court.

[323] Mr. Engel: I was going to suggest that Mr. Kelley is in all likelihood going to be on the stand. That question could be asked him, whether he did in fact, you know, make such an application.

The Court: Or even if he denied it, I would have to admit it in evidence.

Mr. Engel: I mean, if he admitted this, this would just be redundant, Your Honor, and then it would avoid any question of admissibility.

The Court: Oh.

Mr. Engel: And I will stipulate that he filed such a thing with the IEC.

The Court: I will permit the application in evidence. The rest of it should remain marked for identification.

[330] Q. Now, we've talked about a booklet, one is marked Defendant's K, and the other is marked Plaintiff's Number 10. You are familiar with this booklet?

A. Yes, sir.

Q. Are you also familiar with a blue booklet that's used by people down at the piggy-back ramp that contains diagrams with regard to hooking and unhooking automobiles?

A. Are you referring to the annual release from General Motors?

Q. I am not sure. Are you familiar with a blue book that contains diagrams?

A. There is a blue book. There are other color books too, sir.

Q. And are you familiar with the fact that Mr. [331] Jarvis has taken this down to the piggy-back area and participated with a crew of people down there in demonstrating and instructing on how to hook and unhook automobiles with that diagram book?

A. I wasn't there, so I don't know, sir.

Q. Well, are you aware of that?

A. Yes, I will have to say I was aware of it.

[337] Mr. Engel: Q. Let me ask you this. Do you have any knowledge of Pacific Motor Trucking Company ever running a railroad?

A. No sir.

Q. And do you have any knowledge as to whether Pacific Motor Trucking Company has a license to run a railroad?

A. I am sure we don't.

Q. All right. Do you have any knowledge whether Pacific Motor Trucking Company has a license to operate over the highways by motor vehicle?

[338] A. Yes. Yes sir, we do.

Q. And that is a license from the IEC?

A. No sir, it's not a license, it's an authority granted by the IEC.

Q. All right. And pursuant to that authority that is given you to operate trucks over inter-state highways, certain rates are set as to what you can charge?

A. Yes.

The Court: So that when you said that P.M.T. has shipped by rail, you are saying in the same sense that I might ship my furniture by rail?

The Witness: Yes sir.

Mr. Engel: Q. And yesterday, Mr. Calkins, when you referred to a tariff, that is the rate that the IEC authorizes you to charge, isn't that correct, as far as you know?

A. Not necessarily the IEC, but a regulatory agency of some nature.

Q. All right. And—

The Court: You mean, in other words, it's a rate that either the IEC or the California Public Utilities Commission, or somebody like that, authorizes you to charge?

The Witness: Yes sir.

The Court: Absent any tariff, you are given discretion?

[340] Q. I will rephrase that, then. There has always been a contract, though, between P.M.T. and S.P.—strike that.

There has never been a time since you first contracted with Southern Pacific Company that you have not had a contract with Southern Pacific Company to unload automobiles, isn't that a correct statement?

A. I believe that is a proper statement.

[342] "Q. And who it that?

"A. Mr. Charles Myrick.

"Q. How long has he been in the office?

"A. Well, in my office he's been there six years, I guess. Seven years, perhaps."

I might note this was taken February 21, 1968.

"Q. In the Safety Department?

"A. Yes, as a driver trainer.

"Q. He is a driver trainer now?

"A. Yes sir.

"Q. And what kind of drivers?

"A. I beg your pardon?

"Q. What kind of drivers does he work with?

"A. All kinds of drivers. We have over 4,000 people working for us.

"Q. I mean, are these drivers that drive trucks?

"A. Yes sir.

"Q. Does he work with drivers who remove cars from tri-level auto carriers?

"A. No sir, because they aren't drivers.

[343] "Q. Okay, that is what I am trying to clarify. What are the names of the other three that work in your office?

"A. My chief clerk is Rosemarie Klikhammer (phonetic spelling), Nancy Conroy and Jean Molino.

"Q. How long has Mr. Molino worked in the office?

"A. They are all females, they are all ladies. Jean Molino.

"Q. Do you have anybody that works with P.M.T. that works with the drivers or the individuals who drive automobiles off the tri-level auto carriers?

"A. Do we have anyone?

"Q. In the Safety Department?

"A. No sir.

"Q. Is there anybody in the Safety Department that works with the individuals who unload automobiles from tri-level auto carriers for purposes of safety?

"A. No sir."

[344] The Court: All right.

Mr. Engel: Q. Now, yesterday—

The Witness: May I qualify it, sir?

The Court: Yes, you may.

The Witness: I will qualify it in that I have only a staff relationship to accident prevention in our company. It's a line responsibility, so I primarily work with supervisors.

The Court: But as far as you know, Mr. Myrick has not supervised the unloading of automobiles?

The Witness: As far as I know, yes sir.

The Court: And as far as you know, you don't know of any specific instructions he has ever given on that score?

The Witness: No sir, I do not.

The Court: All right.

Mr. Engel: Q. Now, you used the term "grounded" yesterday. Do you remember using the term "grounded?"

A. Grounded?

Q. Talking about unloading automobiles. You said something about after they are grounded.

A. Oh, yes. We remove them and put them on the ground. We call it that.

Q. Okay. Now, have you, sir, since May 25, 1961, ever at any time, up to the present time, ever been advised by Mr. Nugent, who you described as the Chief of the Safety [345] Department of Southern Pacific Company—right?

A. Superintendent.

Q. Superintendent. Have you ever been apprised of any communication that he has issued with regard to safety of P.M.T. forces and particularly with regard to safety railings?

A. Yes sir.

Q. And can you tell me what they are?

A. A safety rail?

Q. No, no, what directives or memorandum, or whatever it is, have you been apprised of that came from Mr. Nugent?

A. Mr. Nugent has been retired for six years. I am trying to remember. During the period when tri-level and bi-level operations and piggy-back generally was starting, there was a great deal of direct relationship between the Southern Pacific and P.M.T. for mechanical reasons, for experimental reasons and for instructional reasons.

Because this was a period when this was somewhat new, and all concerned were feeling our way.

Q. All right, and this is when you received communications from Mr. Nugent?

A. That would be during this period, I'm quite sure. Mr. Nugent has been gone for at least six years, I think.

[349] A. Yes, sir.

Q. And that says "P.M.T." after his name?

A. That's correct.

Q. And the Nugent that we talked about is this Mr. M. A. Nugent here?

A. Yes sir.

Q. It's a name, or it appears that he sent this letter out?

A. Yes.

Mr. Engel: May this be marked, then, in evidence, Your Honor, as Plaintiff's next in order?

The Court: The letter from Nugent to Johnson?

Mr. Engel: Yes, Your Honor.

The Court: All right.

Mr. Engel: No, it's a letter from Nugent to Jekyl with a copy to go to Johnson.

The Court: All right.

Mr. Engel: And in particular, on the last page there are instructions with regard to how to operate these tri-levels and the safety procedures to P.M.T. employees and Car Department employees of Southrn Pacific Company, and whose responsibility it is to raise and lower safety railings. I might add that letter is 1961.

The Court: All right, it will be received.

[350] The Clerk: Plaintiff's Exhibit 12 admitted in evidence.

[Letter marked Plaintiff's Exhibit Number 12 received in evidence.]

Mr. Engel: Q. Mr. Calkins, are you familiar with the American Association of Railroads?

A. I am aware of them, yes, sir.

Q. AAR?

A. Yes sir.

Q. They are a regulatory body, are they?

A. No sir.

Q. What are they?

A. They are an association of railroads.

Q. All right. And does P.M.T. belong to the AAR?

A. No sir, not to my knowledge.

Mr. Engel: Q. Mr. Calkins, do I understand your testimony that you have never dealt with Mr. Nugent?

A. I beg your pardon?

Q. Do I understand your testimony to be that you have never dealt with Mr. Nugent?

A. Never dealt with Mr. Nugent?

[351] Q. You corresponded with him?

A. No, I never said that. I may have corresponded with him over the years, yes. It's possible.

Q. All right. Do you recall discussing Rule 826 with him by correspondence?

A. Don't even know what Rule 826 is, sir.

Q. Okay, can you identify this document, please, for me?

A. Yes, I can identify it. To begin with, Rule 826 is not applicable to an outside company such as P.M.T. It's a railroad designation and it has absolutely nothing to do, other than the fact that anyone using a siding, a team track or a facility such as the piggy-back ramp, for its own protection had better flag the string that they are working on.

Because if they made a switch, it could be quite disastrous.

Q. All right, can you identify the document for me, please?

A. Yes sir, I can.

Q. That's a letter to you?

A. Yes sir.

Q. And it's from Mr. Nugent?

A. Yes sir.

Q. And what was the date of it?

[352] A. June 13, 1961.

Mr. Engel: May I have that marked as Plaintiff's next in order, please?

The Court: Very well.

Mr. Engel: Q. Mr. Nugent at that time, what was his position, again?

A. I believe it was Superintendent of Safety, Southern Pacific Company, sir.

Q. And what was your job in 1961?

A. Manager of Safety and Personnel.

The Clerk: Plaintiff's Exhibit—

A. (continuing)—Pacific Motor Trucking Company.

The Clerk: Plaintiff's Exhibit 13 marked for identification.

[Letter marked Plaintiff's Exhibit
Number 13 for identification.]

Mr. Engel: Q. Now, do you know who a Mr. A. S. McCann is?

A. Yes, I know the man. I think at that time he was Superintendent of one of the railroad divisions, back in '63. I am almost sure.

Q. In '61 you think that was his job also?

A. That could have been, sir. I don't remember.

Q. Do you know who a Mr. McIntrey, I guess is would be M-c-I-n-t-r-e-y— do you know who that is?

[353] A. No sir.

Q. Mr. A. McIntrey?

A. The name is not familiar to me. McIntrey?

Q. How about the initials B.V.M.?

A. B.V.M.? I don't know.

Q. Showing you this next document, do you recognize any of the initials that are stamped on that document?

A. M.A.N., O.J.P. Those must be people in the Southern Pacific Company. B.V.M. What did I say?

Mr. Engel: Let me have it marked next in order as Plaintiff's Exhibit.

A. (continuing) None of those people are familiar to me—those initials.

Q. Other than Mr. McCann that you identified?

A. Yes, Mr. McCann.

Q. And that is, I should add—that's who this document appears to be directed to, Mr. A. S. McCann.

A. Yes sir.

Q. And it's dated June 15, 1961?

A. Yes sir.

Mr. Engel: May I have that document marked as Plaintiff's next in order, Your Honor?

The Court: All right.

The Clerk: Plaintiff's Exhibit 14 marked for identification.

[354] [Document marked Plaintiff's Exhibit Number 14 for identification.]

Mr. Engel: Q. Now, it's your understanding, Mr. Calkins, that Rule 826 is a railroad rule, is that correct?

A. Yes sir.

Q. How about Rule 26?

A. No idea what Rule 26 is, sir.

Mr. Engel: Okay.

[Colloquy among counsel out of hearing of the reporter.]

Mr. Engel: Q. Showing you this next document, Mr. Calkins, recognizing, of course, that the red marks on it were put on there by me, and calling your attention to the bottom down here, does that appear to be a copy of a letter that you received in July, 1961?

A. Yes.

Q. All right. And the date on that . . . Your initials appear down at the "copy?"

A. C. D. Calkins, McCann, Green, Herzog. Who's that?

Q. Well, let me ask you some questions.

A. All right.

Q. That document is dated July 28, 1961?

A. Yes sir.

Mr. Engel: May we have that marked as Plaintiff's [355] next in order, Your Honor?

The Court: It will be so marked. Exhibit 14, is it?

The Clerk: Fifteen. Plaintiff's Exhibit 15 marked for identification.

[Letter marked Plaintiff's Exhibit Number 15 for identification.]

Mr. Engel: Q. And this is a letter directed to Mr. Jekyl from Mr. Nugent, is that correct?

A. Yes sir.

Mr. Engel: Your Honor, again, that document has red lines that I put on there.

The Court: All right.

Mr. Engel: Your Honor, if I may, before the Court reads it, maybe I could ask him some questions as to the names that are on there and then—

The Court: Certainly.

Mr. Engel: Q. Do you know who Mr. Healy is?

A. Yes sir, he was a Safety Supervisor for the Southern Pacific Company.

Q. And do you know who this gentleman is? It appears to be—who was that Hume?

A. Hume was the head of our Claims Department at that time.

Q. All right, and—

[356] A. 1961.

Q. And that's his name just above yours at the bottom of the letter, is that correct?

A. Hume, yes.

Q. Now, Mr. McCann—his name appears underneath yours, is that right?

A. Yes, it does.

Q. And who was he with at that time?

A. I believe he was Superintendent of the Western Division at that time.

Q. Of what?

A. Southern Pacific Company.

Q. Okay.

A. The last name, Herzog, is also a Southern Pacific Safety Supervisor.

Q. Now, did I ask you if you knew who a Mr. M. A. McIntyre is?

A. You did, sir.

Q. And did you know? I have forgotten now.

A. At that time—well, he was an Operating Officer of the Southern Pacific Company in some capacity. What it was, I don't know.

Q. All right.

A. At this time.

[Continued on next page.]

[357] Q. And showing you this next document, doesn't that purport to be a letter dated July 30, 1961, from Mr. McCann, who you have identified as somebody for Southern Pacific, directed to Mr. McIntyre, whom you identified as somebody from Southern Pacific Company? Is that correct?

A. M-hm.

Q. You have to say it audibly.

A. Yes, sir.

Mr. Engel: May I have that marked as—one moment, Your Honor.

The Court: All right, it will be marked.

Mr. Engel: Q. Could I ask if you knew somebody with the initials O. J. P.?

A. I don't think you did.

Q. Do you know who it is?

A. O. J. P.?

Q. Right.

A. Sorry, I don't know.

[358] Q. I note that in the year 1963 it indicates that Pacific Motor Trucking Company did 42 percent of its business with the Southern Pacific Company. Now, are there other companies with which the Pacific Motor Trucking Company did business in 1963, and still does?

A. Yes, sir.

Q. And were these other companies with which the [359] Pacific Motor Trucking Company did business common carriers like Southern Pacific Company?

A. Many of them were.

[364] Mr. Engel: "Q. These are just spot inspections?

"A. Yes.

"Q. And when you inspect, what do you do? What are you inspecting?

"A. We inspect for proper loading procedures on inbound shipments to see if there is anything that loading operation may have caused damage to a vehicle where it had been improperly loaded. We just generally on the unloading points supervise their—inspect their operation to see that the unloaders are not doing anything that might be a [365] hazard for damage to automobiles."

Mr. Engel: Q. Is that correct as a statement?

A. I am not doing too much of that any longer, but I was at the time I made the deposition, yes, sir.

Q. All right, and . . . Now, you had occasion to draft a manual with regard to tri-levels, is that correct?

A. Yes, sir.

Q. And you printed up a thousand copies of that and distributed it to P.M.T.?

A. P.M.T. and other people, other unloaders and loaders.

Q. All right. And this manual was for the man who actually got on the tri-level and did the unloading, is that correct?

A. Yes, sir, it was designed for new employees.

Q. Now, with regard to the damage to automobiles caused in the unloading process, isn't it correct that Southern Pacific Company stands the cost of that damage?

A. Yes, sir.

Q. And damage on a highway, meaning not to the rail car, is paid by P.M.T.?

A. As I understand it, yes, sir.

[367] A. In the period of time between 1962 and 1964, I would go out there to check the terminal operations.

Q. What capacity?

A. As assistant supervisor.

Q. All right. Assistant supervisor in the present department?

A. Specialized operations department at that time, yes, sir.

Q. Okay.

A. Subsequent to that time, I was out there checking the unloading operations of automobiles and—

The Court: Did you ever check unloading operations of automobiles prior to—what is it, 1964?

The Witness: No, sir.

Mr. Engel: Q. Now, prior to your going out there and checking the unloading of automobiles, did anybody in your department do that?

A. Two or three others.

Q. Assistant supervisors?

A. Assistant supervisors, in addition to their other assignments, would periodically check automobiles.

Q. And what were their names?

A. Well, there was the man that introduced me to automobile unloading. His name was R. R. Allice, A-l-l-i-c-e. I believe he was preceded by E. J. Schnabel. And probably [368] prior to Mr. Schnabel was Dick Schriber. And Harold Comstock, deceased, used to check automobiles.

Q. All right. And these are all employees of who?

A. Specialized operations department, Southern Pacific Company.

Q. All right. Now, when you have had occasion to go out there to this area yourself, did the individuals that you worked with—you worked with the P.M.T. people that are out there?

A. Now, 1964 on, when we were checking the unloading, or——?

Q. Well, when you went out there for the unloading, then, you worked with the P.M.T. people?

A. I observed them and I talked to their supervisor.

Q. All right. And before that, did you have occasion to work with P.M.T. people out there then?

A. No, not prior to 1964.

Q. All right. Well, again I call your attention, I am going to read some questions and answers in your deposition, Page 30, Line 10, to Page 31, Line 11.

Mr. Corrigan: Thank you.

Mr. Engel: "Q. Now, when you go to the fourth and Channel Street piggyback area, or have in the past, either as an assistant supervisor or a supervisor, do you have any verbal contact with the men themselves who work on the tri-level [369] cars?

"A. Yes.

"Q. And in what way? In other words, what do you do with them?

"A. Well, on loading of vehicles at Fourth and Channel, foreign vehicles, we have to devise a method of adopting——"

Mr. Corrigan: Pardon me, Mr. Engel. I am sorry to interrupt you, but could you start reading the answer on Line 16 over? The "on loading" and "unloading" run together. Could you read that, please?

Mr. Engel: All right. Well, I will read it over.

"A. Well, on loading of vehicles at Fourth and Channel Street, foreign vehicles, we have to devise a method of adapting the tie-downs on our rail cars to handle foreign automobiles in order that we can carry them by rail without damaging these cars. So we go out and we test load various types of foreign cars and experiment with tie-downs on the vehicles. And we have to have the assistance of the P.M.T. employees to make the various adjustments and tie-downs on the cars for test purposes. So we discuss with them, get underneath the vehicles, or find where on the vehicles we can secure chains, and then make a **[370]** schematic drawing of the tie-down. They will load the car. We will send a wire to the destination and ask that carrier to make an out-check to see if there was any damage as a result of the tie-downs.

"Q. Now, when you do this, are you in effect showing them where to hook it and so forth?

"A. Correct.

"Q. And this is direct with the men who are actually doing it?

"A. Correct.

"Q. And they follow your instructions in this regard?

"A. They offer advice, too.

"Q. But they also follow your instructions?

"A. Yes. It's a mutual thing. We try to devise the best location."

[375] "Q. Are there any, or were there any, or have there ever been any members of P.M.T. who are part of the specialized operations department?

"A. Yes, the whole TFC, Trailer Flatcar Department, which is now in the Transportation Department, at one time was in the Specialized Operations Department, and the P.M.T. Dispatching Office was located in this department. It still is located in this department but it's now in the Transportation Department.

"Q. Now, the Trailer Flatcar Department is P.M.T.?

"A. No, it is Transportation Department. But the P.M.T. Dispatching Office is located as a bureau of this department.

[376] "Q. A bureau of the Transportation Department?

"A. Right.

"Q. How many bureaus are we talking about in the Transportation Department, roughly?

"A. I don't know.

"Q. I mean is it two or several?

"A. Several.

"Q. Are any of the other departments or bureaus P.M.T., other than the one flatcar?

"A. This is the only one I know.

"Q. The other departments are what? Just som of them, for example?

"A. Accounting, Engineering, Mechanical, Law. I don't know of any P.M.T. people being in those departments.

"Q. Who are in those departments?

"A. The employees of those departments.

"Q. Southern Pacific?

"A. Southern Pacific.

"Q. And who heads up the Transportation Department, do you know?

"A. Yes, the General Superintendent of Transportation.

"Q. Do you know who that is?

"A. Mr. J. J. Willis.

[377] "Q. W-i-l-l-i-s?

"A. Right.

"Q. Now, he is the top man in the Transportation Department?

"A. That's right.

"Q. And under his supervision are the various bureaus of the Transportation Department?

"A. Correct.

"Q. And one of those bureaus is P.M.T. Dispatching or something?

"A. In the TFC section.

"Q. Of?

"A. Transportation Department.

"Q. Is it P.M.T., the whole P.M.T., or part of P.M.T.?

"A. Just their dispatchers. The trailer flatcar service is in the Transportation Department. To coordinate activities with P.M.T. They moved their dispatchers in and made a bureau or sub-bureau, if you want to call it, of the TFC section.

"Q. Now, when did this take place, do you know roughly?

"A. Before I was in the department.

"Q. So that would be before when?

"A. I came into the specialized operations [378] department in 1962.

"Q. So it was before that?

"A. Yes.

"Q. And this P.M.T. group is still a bureau within this department?

"A. Yes."

[402] Now, have you ever heard of Convoy Company before?

A. Yes, sir.

Q. And this Convoy Company, is it a trucking company?

A. Yes, sir.

Q. Is it a trucking company separate and distinct from Pacific Motor Trucking Company?

A. Yes, sir.

Q. Is it a subsidiary of Southern Pacific Company?

A. No, sir.

Q. Does this Convoy Company unload tri-levels like Southern Pacific?

A. It unloads tri-levels in Oregon for the Southern Pacific Company.

Q. I meant, my prior question was, what I wanted to say is, does it unload tri-level like Pacific Motor Trucking Company does?

[403] A. That's correct.

[406] Mr. Engel: Your Honor, at this time I would like to read into the record some interrogatories.

The Court: All right.

Mr. Engel: Your Honor, I'm going to, I think this would make it more clear. If the Court feels it wouldn't, then I will do it the other way. But what I am going to do is, I am going to skip from various sets of interrogatories to try and tie them into various ideas, as opposed to tying them to various sets of interrogatories.

The Court: Any objection?

Mr. Corrigan: No sir, as long as he identifies them.

The Court: All right, go right ahead.

Mr. Engel: Now, with regard to the answers submitted **[407]** December 20, 1967, that's the date on the answers, and these are interrogatory answers filed by defendant Southern Pacific Company.

Question Number 1: Is Pacific Motor Trucking Company a corporation, and if so, please state the following: (a) In what year was it incorporated? (b) In what State was it incorporated? (c) Where is its principal place of business at the present time?

Answer Number 1: 1933; California. There is no answer to the (c) part.

Question and Answer Number 3: Has Pacific Motor Trucking Company ever been a wholly owned subsidiary of defendant Southern Pacific Company, and if so, please state the following: On what date did Pacific Motor Trucking Company become a wholly owned subsidiary of Southern Pacific? (b) Please set forth the dates during which period of time Pacific Trucking Company was a wholly owned subsidiary of Defendant Southern Pacific Company, up to and including the present date?

The answer is: On August 2, 1933, Pacific Motor Trucking Company became a wholly owned subsidiary of Pacific Motor Transport Company, which [408] in turn was a wholly owned subsidiary of Southern Pacific Company. On April 10, 1937, Pacific Motor Trucking Company became a wholly owned subsidiary of Southern Pacific Company as a result of the purchase by Southern Pacific Company from Pacific Motor Transport Company of all of the stock of Pacific Motor Trucking Company.

(b) Indirectly from August 2, 1933, to April 10, 1937, and directly from April 10, 1937, to the present date.

Number 5 Please set forth the name, address and employer of all members of the Board of Directors of Pacific Motor Trucking Company.

Answer: R. K. Booth, Vice President and Controller Pacific Motor Trucking Company, 9 Main Street, San Francisco, California. L. E. Hoyt, Vice President, Southern Pacific Com-

pany, 65 Market Street, San Francisco, California. B. R. Johnson, President, Pacific Motor Trucking Company, 9 Main Street, San Francisco, California. D. K. McNear, Vice President, Southern Pacific Company, 65 Market Street, San Francisco, California.

Question and Answer Number 6: What percentage of the capital stock of Pacific Motor Trucking [409] Company was owned by defendant Southern Pacific Company on July 3, 1963?

Answer: 100 percent.

Number 8: For each year since the date of incorporation by Pacific Motor Trucking Company, please set forth the percentage of Pacific Motor Trucking Company's gross income which resulted from business done with defendant Southern Pacific Company.

Your Honor, I don't know how you care about——

The Court: I have gone over all these.

Mr. Engel: Okay. I won't read the answer in, but maybe I can by stipulation—that answer can be considered in evidence?

Mr. Corrigan: Yes, so stipulated.

Mr. Engel: All right.

The Court: It may be stipulated that all the answers given to the interrogatories are in evidence. No?

Mr. Engel: I am just trying to offer certain ones, Your Honor.

Mr. Corrigan: I will stipulate the whole thing can go in.

Mr. Engel: Number 13: Has there been at any time since the date of incorporation of Pacific

Motor Trucking Company a director of officer **[410]** of defendant Southern Pacific Company who was at the same time a director or officer of Pacific Motor Trucking Company?

Answer: Yes.

And then, Your Honor, I would like to offer into evidence Question Number 14 and its answers. It's very lengthy.

Mr. Corrigan: I will agree it may go in.

The Court: All right.

Mr. Engel: Number 20: Are any monies, proceeds or financial assistance of defendant Southern Pacific Company used for the purpose of financing the operation of Pacific Motor Trucking Company? If your answer is in the affirmative, what percentage of Pacific Motor Trucking Company's operational costs are derived from Southern Pacific Company's monies, proceeds or financial assistance?

Answer: From time to time Southern Pacific Company has furnished funds to Pacific Motor Trucking Company for operational purposes. As of August 31, 1967, no such funds were being furnished therefore, percentage of Pacific Motor Trucking Company's operational costs derived from Southern Pacific Company's monies was zero percent. **[411]** That's as of the date of these answers.

21: Since the date of incorporation by Pacific Motor Trucking Company, please set forth the percentage of the total capital stock of Pacific Motor Trucking Company which was owned by

defendant Southern Pacific Company for each year from the date of incorporation of Pacific Motor Trucking Company up to January 1, 1966.

Answer: 100 percent, directly or indirectly.

22. What was the dollar value of the capital stock of Pacific Motor Trucking Company each year from 1961 through 1966?

Answer: For each year it is the same, 350,000 shares, $50 par value, $11,375,000.

Number 35: On the date this accident occurred, was there in effect a policy of insurance by or through which Pacific Motor Trucking Company was insured in any manner or to any extent, whether primarily or excess, with regard to any claim, cause of action, injuries or damages alleged or claimed against Pacific Motor Trucking Company? If so, the number of said policy or policies of insurance, the name of company or companies issuing said policies, the name or names of the insureds and (d), the limits of liability as to **[412]** each policy.

The answer is: Yes. And there are two policies with the numbers set forth, SPF 9577 and SPF 842. Lloyds, an English company, and the other is Transportation Mutual Insurance Company. As to both policies the insured is Southern Pacific Company and/or subsidiary companies, and (d) the policy limits are set forth.

Now, then, moving into the same set of answers, Your Honor, but going back now to Number 16:

Does Pacific Motor Trucking Company own any railroad track or real property upon which railroad track is located?

Answer: No.

Number 19: With regard to the tri-level auto carrier car identified as SF510511, please set forth the following information as it existed on July 3, 1963, at approximately 1:30 P.M.: (a) The name and address and employer of the person or persons or business entity who manufactured said tri-level auto carrier.

Answer: Southern Pacific Equipment Company, 65 Market Street, San Francisco, California.

Number 25: With regard to the area surrounding tri-level auto carrier car identified SP510511, **[413]** on the date of July 3, 1963, at approximately 1:30 P.M., please set forth the following information: (a) The name, address and employer of the person or persons who owned the real property in said area; (b) the name, address and employer of the person or persons who were in possessory control of said real property.

Answer: Southern Pacific Company; Southern Pacific Company, 65 Market Street, San Francisco, California.

Number 28: Does Pacific Motor Trucking Company own, possess or control any real property over which must be traveled in order to get to the site where plaintiff, Eugene Kelley, was injured on July 3, 1963, when he fell from a tri-level auto carrier car identified as SP510511?

Answer: No.

Then Number 33: Set forth the name and address of all railroad companies which Pacific

Motor Trucking Company had contracts with regarding the unloading of tri-level auto carrier cars at Channel and Third Streets in the City and County of San Francisco, State of California, during the period between June 1, '63 and August 1, 1963.

[414] Answer: Southern Pacific Company.

Number 34: Set forth the name and address of all companies which defendant Southern Pacific Company had contracts with regarding the unloading of tri-level auto carrier cars at Channel and Third Streets in the City and County of San Francisco, State of California, between the dates of June 1, 1963, and August 1, 1963.

Answer: Pacific Motor Trucking Company.

Number 40: During the period between June 1, 1963, and August 1, 1963, did defendant Southern Pacific Company have any contractual agreements with Pacific Motor Trucking Company relative to responsibility of either defendant Southern Pacific Company or Pacific Motor Trucking Company for damage done to automobiles that were being transported by Southern Pacific Company and that were being unloaded by Pacific Motor Trucking Company?

Answer: No.

42: With regard to responsibility for damage done to automobiles being unloaded from tri-level automobile carrier cars, has defendant Southern Pacific Company made any claims of any nature against Pacific Motor Trucking Company **[415]** relative to Pacific Motor Trucking Company's

responsibility for payment of or compensation for damage done to said automobiles?

Answer: No.

And if we can go to the interrogatories of September 16, 1968, the answers of that date?

Number 1: In the deposition of Mr. Roy Hedland on September 6, 1967, Mr. Hedland stated that the rate charged by Southern Pacific Company in certain instances included the charge involved of setting the automobile off of a tri-level auto carrier on to the abutting ground. Mr. Hedland further stated that whether these charges are included or not depends on a point of origin and the point of destination. With regard to Mr. Hedland's testimony, please set forth the following: What points of origin and what points of destination give rise to a charge made by defendant Southern Pacific Company for removing automobiles from tri-level auto carriers as of July 5, 1963?

Answer: Contrary to Mr. Hedland's impression, all rates for inbound movement of automobiles on tri-level cars in July of 1963 included the charge for unloading the automobiles without **[416]** regard to the origin of the particular shipment.

And—let's see. Referring to the same set of interrogatories, answered September 16, 1968,

Number 5: On July 3, 1963, did Pacific Motor Trucking Company own, rent or lease any equipment used by personnel in the unloading of auto-

mobiles from tri-level auto carriers at Fourth and Channel Streets?

Answer: No.

Then going over to October 18, 1968, answers.

The Court: Will you give me that one again? Read that last one.

Mr. Engel: On July 3, 1963, did Pacific Motor Trucking Company own, rent or lease any equipment used by personnel in the unloading of automobiles from tri-level auto carriers at Fourth and Channel Streets?

The Answer is: No.

[424] A. July 3, 1963.

Q. And where did it occur?

A. At the piggy-back ramp, San Francisco.

Q. At what time?

A. Approximately between 1:30 and 2:30.

Q. You were working at the time?

A. Yes, I was.

Q. And what were you doing?

A. Unhooking automobiles on a tri-level.

Q. Okay. When you say a tri-level, what is a tri-level?

A. It's a triple decker car that hauls automobiles on the railroad tracks.

Q. Showing you Plaintiff's Number 1, can you tell me what that is a picture of?

A. That's a tri-level.

Q. All right. And that's the type of railroad car you were working on at the time?

A. Yes.

Q. And when the accident occurred, whereabouts on the tri-level were you?

A. I was on the top deck.

Q. And was this railroad car on railroad tracks at the time?

A. Yes, it was.

[425] Q. Were you with anybody?

A. Yes, three other fellows I worked with.

Q. Can you tell me what their names are?

A. John Grimaddo and Connie Oosterbaan and George Pryal.

Q. Now, how long had you been doing this work on this—or this tri-level work, let's say, on this particular day before the accident occurred?

A. We started right after lunch.

Q. All right. Sorry, I didn't hear that.

A. I am not positive. I think we started right after lunch.

Q. All right, and what time was lunch hour?

A. 12:00 to 1:00.

Q. So sometime after 1:00 o'clock, you began work on the tri-levels?

A. That's right.

Q. Now, earlier that day you had been at work?

A. Yes.

Q. What were you doing?

A. Unloading the piggy-back service.

Q. Now, can you tell us specifically the job that was yours with regard to the tri-level? What were you supposed to do?

A. The day I got hurt?

[426] Q. Well, at the time you got hurt, right.

A. I was unhooking the hooks in the chain from the automobiles.

Q. All right. How long had you been working at this location?

A. I think it was from '60 when I went back on the piggy-back.

Q. When you what?

A. 1960 I went back on the piggy-back.

Q. All right. You had—well, had you been at the piggy-back and then gone away and then come back in '60?

A. Yes.

Q. All right. And how long had you been away from the piggy-back when you came back in '60?

A. Oh, two years, I guess.

[427] Q. I am sorry?

A. Two years, I believe.

Q. And then how long had you been at the piggy-back before that?

A. 'Til '55, when I went on the piggy-back, and I worked several years and then I went on the mail for almost two years, I think it was, and then I went back to the piggy-back.

Q. All right. So between, say, '58 and '60, you worked the mail?

A. Yes.

Q. And then from '55 to '58 you worked piggy-back?

A. Right.

[434] The Court: Well, somebody raised the railing there?

The Witness: Right.

The Court: On each job. Well, who did that work?

The Witness: Anybody could do it.

The Court: Well, the members of your crew did it? Did you ever see the carmen do it before you started the job?

The Witness: No, I can't say I did.

The Court: So that when you say anyone, you mean anyone, for instance, such as the four of you that were working there on the third of July?

The Witness: Right.

The Court: But you never have seen a carman do it while you were working there?

The Witness: I have seen them raise them to check them.

The Court: To check them and test them?

The Witness: Yes, I know that.

The Court: Did you ever see them raise any in preparation for unloading?

The Witness: No, I can't say I did.

[435] The Court: All right, go ahead.

Mr. Engel: Q. Now, when you say that there may be a crew over at the tri-level, your job was usually with the piggyback, you said?

A. That's right.

Q. And that's distinct, a distinct assignment, anyway, from the tri-level?

A. Right. They had a bid that four other guys bid on tri-level work, and we had seniority, so we worked piggyback. If we got through unloading piggyback, then we would go over and help them drive them off or untie them, whatever we could do to help.

Q. All right. So in other words, you had seniority, so you bid for the piggyback as opposed to the tri-level?

A. That's right.

[438] Mr. Engel: Q. Now, do you know a fellow named Dick Schriber?

A. Yes.

Q. And have you ever seen him out in that area?

A. Yes, I have, a lot of times.

Q. Have you seen him give any orders or directions to piggyback personnel out there?

A. Yes.

Q. And have you, yourself, ever had any difficulties or trouble with Mr. Schriber?

A. Yes, I have.

Q. And can you tell us what that was?

A. Well, one time when we were working tri-levels, I was again, at this time I was unhooking the chains and the hooks, and it was on the bottom deck, and rather than fight **[439]** squeezing between the outside railings and the automobiles and stuff, I was doing it from the ground. With my height and my arms, I could reach in and do it the easier way. And he ran over to Mr. Pinkston and told him that I wasn't working. So Mr. Pinkston come over and proceeded to jump on me because I wasn't working, and I told him I was, and showed him that they were all unhooked. And he says, "Well, to satisfy them, jump up on there and do it the other way."

Q. All right. Now, was it unusual to see Southern Pacific personnel down there?

A. No.

Q. And what was the general response when Southern Pacific personnel came down there?

A. Well, when they come around, you'd move out and look busy.

Q. And why was that?

A. Well, because you could get in trouble.

Q. All right. Did you guys down there ever make any remarks or cracks about that?

A. Yes, we wished they would stay up in their office at Market Street and leave us alone.

Q. Did you ever borrow any money from the Southern Pacific Credit Union?

A. Yes, I did.

[440] Q. Have you ever had occasion to have a free railroad pass?

A. Yes, I have.

The Court: How long have you been a member of the Union?

The Witness: Since 1955.

The Court: Have you always believed that the Credit Unions were owned by the corporations?

Mr. Engel: Your Honor, you mean——?

The Court: Any credit union. Teamsters have a credit union too, don't they?

The Witness: Yes, I think they do. I never looked into it.

The Court: All right.

Mr. Engel: Q. How did you get your free railroad pass?

A. You went to Mr. Hellwig and asked for it.

Q. Okay. And have you seen other Southern Pacific personnel down there that you can remember the names of?

A. It was a Carl Fleischman [phonetic spelling], I don't remember his title, but I remember seeing him down there a lot.

Q. All right, other people?

[441] A. There were several others, but I can't remember their names.

Q. All right. How about any Southern Pacific personnel that inspected the automobiles before they could be loaded?

A. Yes, I have seen them down there, but I don't know their names.

Q. Now, the keys that you talked about with regard to unlocking these automobiles—where were they kept?

A. In a box on the tri-level itself, on the car.

Q. All right. It's part of the tri-level?

A. It's welded to the car.

Q. All right. And this would be the first step in unloading those automobiles?

A. Yes.

Q. And have you had occasion—are you familiar with there being a flag that's attached to the last car in a line of these railroad cars?

A. Right.

Q. Have you ever had occasion to have a Southern Pacific switchman tell you to take the flag off?

A. Yes.

Q. And you have done it?

A. Yes.

Q. Have you ever had occasion to be working on a [442] piggyback car or tri-level car when the engine is attached to the car waiting for you people to finish loading or unloading?

A. Yes, I have.

Mr. Engel: All right, that's all I have, Your Honor.

Cross-Examination

By Mr. Corrigan:

Q. Mr. Kelley, on the occasion that—if you would complain about something and you went to your shop steward, the man you thought about and then you remembered his name, he was a teamster's shop steward, isn't that right?

A. Right, yes.

Q. And you were a member of Local 85, isn't that right?

A. Right.

Q. And so if things got unbearable and people were telling you what to do and, you know, you just weren't going to put up with it any more, you'd go to the teamster's steward, right? I mean, that's the guy you looked to?

A. Yes.

Q. All right. Now, if you were out there and someone was giving you orders that you felt were improper, the fellow you looked to to straighten the situation out in [443] the first instance, the first guy, would have been Pinkston, right?

A. M-hm.

Q. You have to answer up.

A. Yes.

Q. And if Pinkston couldn't straighten it out, then it was Red LaBerge?

A. M-hm, that's right.

Q. And Red LaBerge was the assistant terminal manager, right?

A. Right.

Q. And he was employed by P.M.T., right?

A. That's right.

Q. And if things weren't working out and Red could not straighten it out, and Pinkston couldn't straighten it out, you could then go to George Hellwig right?

A. That's right.

Q. And George Hellwig was the top P.M.T. man out there, right?

A. That's right.

Q. He ran that terminal, right?

A. That's right.

Q. And Pinkston was your boss, right?

A. Right.

Q. All right. Now, your father worked for the

[449] Mr. Corrigan: Q. By the way, sir, when you want to work for the railroad or P.M.T., you made an application out to the Pacific Motor Trucking Company, didn't you?

A. Yes.

Q. And it was your understanding that you were applying for employment at Pacific Motor Trucking Company?

A. That's right.

Q. I mean, you knew there was such a company, because your dad had worked for it, right?

A. Right.

[451] Mr. Corrigan: Q. Now, in addition to all the other jobs you had out there, sir, did you drive away automobiles for P.M.T. from time to time?

A. Yes.

Q. And would you drive them to the dealers around town?

A. That's right.

Q. Would you take them off the tri-level and—under what circumstances would you drive an automobile to a dealer, sir?

A. If they were overloaded and didn't have enough carriers and stuff, why, if we didn't have a lot of piggybacks to load or something, sometimes they had us drive automobiles to dealers.

[452] Q. And what did P.M.T. use these tractors for that were out there, Mr. Kelley, in your opinion?

A. Tractors?

Q. Yes.

A. For hauling vans and auto carriers and——

Q. Well, would they use their tractors to haul the vans off of the piggyback flatcars, for example?

A. That's right.

Q. Those would be P.M.T. vans? I mean, P.M.T. tractors, is that right?

A. Yes.

Q. All right. So then, as far as you know, it was P.M.T. tractors that hauled the vans off the piggyback?

A. Right.

[458] "Q. But Local 85 was a Teamsters outfit, is that correct?

"A. Yes.

"Q. You at no time belonged to a railroad union, is that correct?

"A. No."

Mr. Corrigan: Q. So we get that straight, you at no time belonged to a railroad union?

A. No.

Q. Now, I have still got a double negative there.

Mr. Engel: I think he has already answered it.

The Court: You were a member of the Teamsters Union?

The Witness: That's right.

The Court: Not a member of any railroad union?

The Witness: No.

The Court: All right.

[467] "Q. Which one of you fellows would have had the job to put up the safety rails?

"A. Any one of us."

[472] A. Right. Well, we had occasions where if we were sitting or having a break in the afternoon or morning, and here come a bunch of S.P.—Schriber with a bunch of other people, or anybody from the S.P.—why, he would say "Let's go, here come the boys from Market Street."

[476] Q. And what was your job as clerk?

A. Well, I took care of all the railroad freight coming in, the railroad piggyback cars and tri-levels.

Q. What did you take care of? I mean, did you have paper or what did you do?

A. Well, I checked the cars, the railroad cars and piggyback cars, and the vans were on those cars.

Q. What did you check, the waybills, or——

A. No, I checked the cars when the trains came in.

The Court: You checked off the numbers of the cars?

The Witness: Yes, checked the numbers of the cars.

The Court: Checked the seals, too?

The Witness: No, there were no seals on those cars. They were piggyback cars. They call them piggyback cars—two trailers on each car, and I checked the number of the car and the number of the——

The Court: Take the tri-levels. They had a key box, didn't they?

The Witness: Yes.

The Court: Did you check those?

The Witness: No, I didn't.

The Court: To see they were intact?

[477] The Witness: Just checked the number of the tri-level, checked the number of automobiles that were on each tri-level.

The Court: All right.

Mr. Corrigan: Q. When you did that, what did you do with the information?

A. I went out with a rough, oh, switch list and then I typed it out and I made different copies, and I gave some to the P.M.T. and kept some, and sent some to the office, the office at Fourth Street.

Q. All right, now, did you ever climb on the tri-levels and help unload them?

A. No, no, I never did anything like that.

The Court: Ever give anybody any directions with relation to unloading, yourself?

The Witness: No, never did.

The Court: Really, all you did was check the number of the car and the number of the automobiles or vans on each car?

The Witness: Yes, that was my job, yes.

[478] Mr. Corrigan: Q. I know what I wanted to ask you: Were there any other Southern Pacific men who worked in this area where this accident to Kelley happened besides yourself?

A. Well, outside of the switchmen and the car inspectors.

Q. Well, let's not count the switchmen for the moment, but we have heard the name car whacker, and we met Manuel Teijeiro.

A. Teijeiro, yes.

Q. Manuel. And we met Robert Graham. Now, was it Manuel and Robert Graham and yourself—were you the three Southern Pacific men who worked on a day-by-day or day-to-day basis in that area?

[479] A. Yes. Well, I was the day man and then then there was an afternoon and a night man there.

Q. But the afternoon and night men did the same thing as you did?

A. Yes, that's right.

Q. Well, in the day time, let's just hold it to the day time, okay? Besides yourself and Manuel and Robert Graham, were there any other Southern Pacific people that worked around there all the time?

A. No one. Not—I can't—not that I know of.

Q. All right. Now, when did you first know about this accident happening?

A. On the afternoon that the man was hurt.

[480] Q. You have got to speak up. I can't hear you.

A. The afternoon after the man got hurt. No.

Q. Did you see him get hurt?

A. Didn't see him, no.

Q. How did you know he got hurt?

A. Somebody told me a man got hurt on the piggyback.

Q. And you went over there?

A. No, I didn't go over there. I didn't go over there.

Q. You never went over there?

A. No.

Q. How far away from him were you when he got hurt?

A. It would be about a block, I imagine.

[483] A. I became assistant superintendent.

Q. And who was your boss?

A. At that time?

Q. Well, let's get right down to it. Who was your boss when Kelley got hurt?

[484] A. Mr. George Hellwig.

Q. And did a man named Pinkston work under you?

A. Yes, he did.

Q. And was Pinkston in charge of running or seeing that Kelley and the other platform men did their work?

A. Yes, sir, he was the foreman at the piggyback ramp.

Q. And did you have a fellow there named Dutch Hauff?

A. Yes.

Q. And is he a P.M.T. employee?

A. Yes, sir, he was a foreman.

Q. Now, how long had you worked down there around that piggyback operation?

A. From about 1958. I was transferred to Sacramento, I was there three years, and I came back and I was in San Francisco from '58 up until I retired.

The Court: From whom did you take your directions or orders?

The Witness: I took my orders directly from the terminal manager, Mr. George Hellwig.

[489] Q. All right. And have you ever gotten a free railroad pass?

A. Yes, sir, I have.

Q. Do you have a permanent one after ten years of service?

A. Yes, sir, I do.

Q. That was part of your benefits or compensation for staying ten years in the service?

A. The one that I have is . . . Yes, yes.

[493] Q. During the course of your day, did you have. . . . Do you know anybody that works for S.P. that you ever see down in that area where you work?

Mr. Corrigan: I am sorry. You mean at the time of the accident?

Mr. Engel: Yes, say in 1963.

Q. Did you ever run into any S.P. people as you went through your day?

A. Yes.

Q. All right, who did you run into when you went [494] through a normal day? Do you remember the names of any of them?

A. Well, there was the clerk on duty, Mr. Holland.

Q. Okay.

The Court: Mr. Schriber; did you ever see him down there?

The Witness: Oh, occasionally, yes sir.

The Court: Did he ever give you any instructions?

The Witness: No, sir.

Mr. Engel: Q. Anybody else that you would run into?

A. I'd run into perhaps the agent or assistant agent, mostly.

The Court: Did you ever run into Mr. Hedland?

The Witness: Yes, sir.

The Court: Did he ever give you any instructions?

The Witness: No, sir.

The Court: Ever run into Mr. Jarvis?

The Witness: Yes, sir.

The Court: He ever give you any instructions?

The Witness: No, sir.

The Court: Did any of these men whom I have just named—Hedland, Jarvis or Schriber—ever give any instructions to any of the unloaders in your presence?

The Witness: No, sir, not in my presence.

[495] The Court: To your knowledge?

The Witness: No, sir.

The Court: Ever see any of those men ever give any instructions to Mr. Hellwig?

The Witness: Not instructions.

If they had a problem, why, they would discuss it with Mr. Hellwig, yes.

The Court: All right.

[498] The Court: Anyone in Southern Pacific ever give any directions to a truck driver, to your knowledge?

The Witness: No, sir.

The Court: Did you have any supervision over the trucks themselves?

The Witness: Yes, sir, they come under my jurisdiction.

The Court: They came under your jurisdiction?

The Witness: Yes.

The Court: For all purposes?

The Witness: Yes.

The Court: Anyone give any direction to a truck driver other than yourself or Mr. Hellwig?

The Witness: Yes, our foreman could.

The Court: What's his name?

The Witness: Well, we had several of them. Mr. [499] Pinkston, Mr. Hauff.

The Court: All right.

The Witness: These were all Pacific Motor Truck personnel.

The Witness: Yes, sir.

The Court: All right. Could anyone other than Pacific Motor Truck personnel give an order or direction to a driver?

The Witness: No, sir.

The Court: Or give an order or direction with relation to the truck or the use thereof?

The Witness: No, sir.

The Court: Or the repairs of the truck?

The Witness: No, sir.

The Court: All right.

[513] And I submit that what the Smith case is saying is that we have here a non-delegable duty concept, that this railroad had a franchise and a contractual obligation to unload these obligations, and they cannot delegate that responsibility to an independent "independent contractor," and thus say "we are not responsible to those employees."

[515] And just as in this case, the responsibility of unloading those automobiles was the railroad's; and I think the most—for purposes of understanding the position of the plaintiff in this case, we are not saying that all members of Pacific Motor Trucking Company come within the FELA. What we are saying is that a man, such as Mr. Kelley, and each case—all of the cases agree, that each case is to be governed by the facts in that particular case. A man unloading automobiles, when that situation is under the franchise and contractual obligation of the railroad, and under the circumstances of this particular case, given the evidence that is presented to the Courts, this Court, that man does qualify as an "employee." And I specifically mean in quotes, for purposes of FELA.

[516] As to Mr. Kelley, he was specifically performing a non-delegable duty on the part of the railroad, and that was the contractual and franchise responsibility of unloading automobiles.

The Court: All right.

[517] So the cases then line up.

The Court: Didn't they hold——

Mr. Corrigan: What's that, sir?

The Court: —In effect, in substance and effect, the traditional agency standard should apply.

Mr. Corrigan: In the——

The Court: And for the purposes of determining whether he is an employee?

Mr. Corrigan: Yes. And they were wrong, for reasons I am about to discuss with Your Honor.

But, for the first time now in all of these cases, Smith came up with——

The Court: Well, isn't the heart of your case an argument that the term "employee" as used in the Act was intended to apply to the employees of the carrier and that there is no method by which you can conclude on the facts, and let's say of this case, that Eugene C. Kelley was an employee of the railroad?

Mr. Corrigan: Correct.

The Court: Now, aren't you entitled to look to the law of "agency" to determine whether he was an employee of the railroad?

[520] Mr. Corrigan: Well, let me approach the problem this way, Your Honor: In the Smith case, and this is the focal point, I think, to understand it, they say this: That traditional concepts of agency can extend the Act. I think those are the words.

Now, I appreciate the meaning of Section 220 of the Restatement and how a man becomes a servant for another employer besides his general employer. I think the facts in this case support us with regard to the Restatement of Agency and the criteria it sets down. But here is where Smith made **[521]** the mis-

take when they said "the traditional concepts of agency extends the Act." The Act by its own terms provides that an employer in interstate commerce by rail will be responsible to its employees for negligence and—*and* agents of that employer will also be responsible to the employee if injured. Now, that's the concept of agency.

The Court: I know.

Mr. Corrigan: And——

The Court: That calls for a strict interpretation of that language, and I am not persuaded that despite the legislative history, and even as it relates to the so-called statement of the Teamsters Union and everything, that it covers these facts. I certainly would understand it covering after the car is deposited on the dock and the Teamster in the true sense of the word is the guy who picks it up and goes out and delivers it, if that were the facts of this case **[521]** I don't think there would be any doubt in my mind the proper interpretation of the legislative history and the meaning of the Act would bring him outside of FELA. But we are not quite there. We are on the cars, and we are on the railroad cars, and we are removing automobiles, and we are doing a job that's basically the job of the Southern Pacific for which it has responsibility. And I don't think that's a delegable responsibility as far as that goes, the unloading.

[525] The Court: Well, isn't the unloading of automobiles a non-delegable duty of a railroad?

[538] The Court: Now, what about the last question that counsel asks? He says the crucial question is the question of immediate control.

Mr. Engel: All right, Your Honor, if I may.

To begin with, Your Honor, counsel says there are five cases and all of them but Smith have been decided factually in favor of the railroad.

The Court: Well, I am going to assume for a moment there are no cases on either side.

Mr. Engel: Well, there are several cases the other way also.

The Court: His basic argument is that this man is paid by PMT, and they have the immediate control over him and his operations and that he looks to PMT people only. He **[539]** really doesn't look to the railroad people, and so they say here immediate control is that of PMT, and that this is the primary factor that you have to look to. All right. This factor is absent, where does the relationship of Kelley to the railroad exist in sufficient form or substance as to make him an employee?

[545] This language and these guides cause the Court to conclude that on the facts presented and the record made in this case, the Court finds that the work being performed by Eugene C. Kelley on July 3rd, 1963, was in fulfillment of a non-delegable duty of the railroad which brought him within the traditional agency relationship as a matter of fact, and **[546]** in such relationship to the Southern Pacific Company as to be covered by FELA.

Now, that's the substance of my holding. Now, gentlemen, I recognize that the problem is a difficult one. And while this is my considered judgment as to an appropriate finding to be made on these facts, I cannot say that the position taken by the defendants here is without merit.

[559] *Thursday, April 16, 1970*

The Clerk: Civil Case No. 45344, Kelley vs. Southern Pacific Company, further trial.

The Court: All right, gentlemen.

Mr. Engel: Your Honor, this morning I filed the—as long as I had to go ahead and prepare an argument——

The Court: I have read your memo, and I would like to ask you gentlemen a question at the very outset here.

This matter is before me at the present time for a limited purpose, I am correct in that, without saying what it is, for the moment.

Mr. Engel: Yes, Your Honor.

The Court: Did you have a request for a jury trial here?

Mr. Engel: Yes, Your Honor.

The Court: So that presumably if a ruling were in favor of the plaintiffs eventually you would have a jury trial. If it's against the plaintiff, that presumably will end the case.

Mr. Engel: Correct, Your Honor.

The Court: All right: Now, in determining the relationship of Mr. Eugene C. Kelley to the Southern Pacific Company, are you gentlemen in agreement as to whether this is or is not a question for decision by the Court, or are there **[560]** circumstances under which this may become a question for decision by the jury?

Mr. Corrigan: Well, I believe the pretrial order provides, and we have so agreed in our pretrial statements, that this is a decision for the Court.

The Court: So that to the degree that any facts are involved in rendering that decision, I become the trier of the facts for that purpose?

Mr. Corrigan: Yes, sir.

Mr. Engel: Correct, Your Honor.

The Court: All right.

Mr. Engel: In other words, it was my understanding——

The Court: All right. As long as I have that understanding, I know—that I didn't want to have any confusion on that arise at any time in the course of the proceedings, because the reason I make this observation, in reading the Baker case, for instance, the Supreme Court found it to be a question in a sense for the jury.

Mr. Engel: Well, Your Honor, what we did here is that we bifurcated the trial in fact, and we asked for—there were two factual problems, the one being presented to the Court now, and the other one would be negligence and damages in a subsequent trial.

For this factual question it was agreed that you would be the trier of fact.

[561] The Court: As long as I understand that there is no possible misunderstanding.

Mr. Engel: And the legal part had already been resolved, Your Honor, by the motion for summary judgment. In other words, we had the argument as to whether it was a legal defense.

The Court: Well, but you see, a motion for summary judgment carries with it the question of whether there is a conflict in the facts. And the motion for

summary judgment, which is a three-line order, or a four-line order, does not tell us anything on that score.

Mr. Engel: Right.

The Court: It could be that the judge denied the motion for summary judgment because he said I can't pass on it because there is a conflict in facts which has to be resolved.

Mr. Engel: Well, that was by understanding of the order, Your Honor. In other words, there was a factual question presented.

The Court: So he made no ultimate ruling on the law in the denial of summary judgment. He merely said, because there is a conflict on the facts, I must deny summary judgment.

If he made a ruling on the law I would have some difficulty understanding why you are here at all in the sense of having a bifurcated trial of an issue. All right.

[598] The Court: All right.

While an understanding of the full scope of the language of the statute, and, in particular, the terms "while he is employed by such carrier" presents serious difficulty, the Court finds some aid and a guide in the language of the Supreme Court in the Baker case wherein the Court said: "It has been well said of the question . . ." and the question they are referring to is the question of the use of the terms "employ" and "employed" in the Act.

Now, to repeat: "It has been well said of the question that each case must be decided on its peculiar

facts. And, ordinarily, no one feature of the relationship is determinative.

This language when justifiably considered with some of the language in the decision in the Smith case, and, particularly, the statement 'operational activity' aside, we think the nature of the work being done by Baker for the railroad militates toward a finding of agency on standard agency principles."

This language and these guides cause the Court to conclude that on the facts presented and the record made in this case, the Court finds that the work being performed by Eugene C. Kelley on July 3rd, 1963, was in fulfillment of a non-delegable duty of the railroad which brought him within the traditional agency relationship as a matter of fact, and **[599]** in such relationship to the Southern Pacific Company as to be covered by FELA.

Now, that's the substance of my holding. Now, gentlemen, I recognize that the problem is a difficult one. And while this is my considered judgment as to an appropriate finding to be made on these facts, I cannot say that the position taken by the defendants here is without merit.

RESTATEMENT, AGENCY 2d
WHO IS A SERVANT

§ 220. Definition of Servant

(1) A servant is a person employed to perform services in the affairs of another and who with respect to the physical conduct in the performance of the services is subject to the other's control or right to control.

(2) In determining whether one acting for another is a servant or an independent contractor, the following matters of fact, among others, are considered:

(a) the extent of control which, by the agreement, the master may exercise over the details of the work;

(b) whether or not the one employed is engaged in a distinct occupation or business;

(c) the kind of occupation with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;

(d) the skill required in the particular occupation;

(e) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work;

(f) the length of time for which the person is employed;

(g) the method of payment, whether by the time or by the job;

(h) whether or not the work is a part of the regular business of the employer;

(i) whether or not the parties believe they are creating the relation of master and servant; and

(j) whether the principal is or is not in business.

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In the United States Court of Appeals
for the Ninth Circuit

No. 71-2262

Eugene C. Kelley,
Plaintiff and Appellee,
vs.
Southern Pacific Company,
a corporation,
Defendant and Appellant.

[Filed October 13, 1971]

MOTION FOR CORRECTION AND MODIFICATION OF RECORD

Pursuant to Rule 10, Federal Rules of Appellate Procedure, defendant and appellant moves the court

to correct and modify the record by adding thereto the "Findings of Fact and Conclusions of Law", marked Exhibit A, attached and made a part hereof. The ground for the motion is that this paper was regularly submitted by plaintiff and appellee to the court below and formed part of its consideration, that it was omitted from the record by error or accident, and that the paper is material to the appeal of defendant and appellant, all as is more particularly shown by the affidavit of Donald Roy attached hereto and submitted in support of this motion.

Dated, October 13, 1971

/s/ Donald O. Roy
Donald O. Roy,
Attorney for Defendant and Appellant
Southern Pacific Company
One Market Street, Room 834
San Francisco, Calif. 94105

October 14, 1971, So ordered R. W. Chambers Judge.

Donald O. Roy
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One Market Street, Room 834
San Francisco, California 94105
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Extension: 21542
Attorneys for Defendant and Appellant
Southern Pacific Company

In the United States Court of Appeals
for the Ninth Circuit

No. 71-2262

Eugene C. Kelley,
Plaintiff and Appellee,
vs.
Southern Pacific Company,
a corporation,
Defendant and Appellant.

AFFIDAVIT IN SUPPORT OF MOTION FOR CORRECTION AND MODIFICATION OF RECORD.

State of California
City and County of San Francisco ss.

Donald O. Roy, being duly sworn, declares and says:

The document attached hereto marked Exhibit A and entitled "Findings of Fact and Conclusions of

Law" was received in the mail at the end of May or beginning of June, 1970. The document is actually requested or proposed findings and conclusions, and was prepared and submitted by R. Jay Engle, Esquire, attorney for plaintiff and appellee. In response thereto we submitted to the court a document entitled "Objections to Plaintiff's Proposed Findings of Fact . . ." etc. This document became part of the record (Clerk's Record p. 328) and is noted in the Clerk's docket entires on June 5, 1970, item #83 (Clerk's Record p. 393).

Following submission of the above documents a hearing was held in chambers of The Honorable Alfonso J. Zirpoli, the trial court judge. I personally attended this hearing. Judge Zirpoli had in his possession and referred to and used the requested findings submitted by plaintiff. Through error or accident the plaintiff's proposed findings did not become part of the record on appeal, and in fact no filing entry for the document is noted in the Clerk's docket entries. The plaintiff's proposed findings are material to defendant's appeal in that the court used some, modified some and rejected others and this will or may explain, and clarify, if necessary the court's actual findings and conclusions as adopted and filed on June 29, 1970 (Clerk's record p. 335). Plaintiff's proposed findings are essential to a proper understanding of the issues and the court's actions, and are material and essential to defendant's appeal. I therefore request that, pursuant to Rule 10, Federal Rules of Appellate Procedure, this court correct and modify the record by

adding thereto the "Findings of Fact and Conclusions of Law" requested by plaintiff, marked Exhibit A and attached hereto.

Dated: October 13, 1971

/s/ Donald O. Roy
Donald O. Roy,
Attorney for Defendant and Appellant
Southern Pacific Company
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Attorney for Plaintiff

In the United States District Court
For the Northern District of California

No. 45,344

Eugene C. Kelley,
Plaintiff,
vs.
Southern Pacific Company,
a corporation,
Defendant.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Plaintiff, Eugene C. Kelley, requests the following findings of fact and conclusions of law be made:

FINDINGS OF FACT

I. Plaintiff, Eugene C. Kelley was injured July 3, 1963 at the multi-level railroad car loading and unloading ramp of defendant Southern Pacific Company at 4th and Channel Streets, San Francisco. At such time and place, plaintiff, Eugene C. Kelley, along with three other persons, was assisting in the unloading of

automobiles from the top level from the tri-level railroad car.

II. Defendant, Southern Pacific Company, by and through agreement with Pacific Motor Trucking Company had the right to exercise control over the details of the work being performed by the plaintiff, Eugene C. Kelley at the time of the accident in question.

III. The work being performed by plaintiff Eugene C. Kelley at the time of the accident in question was not distinct from the business that defendant Southern Pacific Company was authorized to do and was doing at the site where the accident in question occurred.

IV. The work being performed by the plaintiff, Eugene C. Kelley at the time of the accident in question was not such that required skill.

V. Defendant, Southern Pacific Company, supplied the instrumentalities, tools, and the area in order to perform the work being done by the plaintiff at the time of the injury in question.

VI. The plaintiff, Eugene C. Kelley had been employed at this particular job and location for a period of eight years and there was no time limitation upon which this employment of Eugene C. Kelley would terminate.

VII. The plaintiff, Eugene C. Kelley was paid by the hour and not on the basis of work or job completed.

VIII. The work being performed by the plaintiff Eugene C. Kelley was part of the regular business of defendant Southern Pacific Company.

IX. Defendant Southern Pacific Company and the plaintiff Eugene C. Kelley believed that a relationship of master and servant existed between the plaintiff Eugene C. Kelley and defendant Southern Pacific Company.

X. Defendant Southern Pacific Company was authorized to do and was in fact doing the business of unloading automobiles at the site of the accident in question from the top level of the tri-level railroad car from which the plaintiff Eugene C. Kelley fell on July 3, 1963.

XI. All of the real properties surrounding the area where the accident occurred was owned and controlled by defendant Southern Pacific Company.

XII. During the eight years that plaintiff Eugene C. Kelley was so employed he worked regular hours as a full-time employee at the specific area where the accident in question occurred.

CONCLUSIONS OF LAW

I. The plaintiff, Eugene C. Kelley, was an "employee" of defendant Southern Pacific Company as set forth in *Baker v. Texas and Pacific Railroad* (1959) 359 U.S. 227 and *Ward v. Atlantic Coast Line* (1960) 362 U.S. 396.

II. This Court has jurisdiction under the Federal Employers Liability Act, 45 U.S.C. §51 et seq.

Dated: .....

Honorable Alfonso J. Zirpoli

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1973

No. 73-1270

EUGENE C. KELLEY,
Petitioner,

vs.

SOUTHERN PACIFIC COMPANY, a corporation,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
to
the United States Court of Appeals
for the Ninth Circuit

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(2) Does Federal Rule of Civil Procedure 52(a) preclude the appellate court from reversing the district court's factual conclusion unless the evidence failed, completely, to support the district court's findings?

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1973

No.

EUGENE C. KELLEY,
Petitioner,

vs.

SOUTHERN PACIFIC COMPANY, a corporation,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit

Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in this case on June 29, 1970. A Petition for rehearing pursuant to Federal Rules of Appellate Procedure 35(b) was denied November 21, 1973.

I

OPINIONS BELOW

The Findings of Fact and Conclusions of Law by the District Court, filed June 29, 1970, are unreported. They are reproduced in Appendix A to this petition. The opinion of the Court of Appeals is reported at 486 F.2d 1084 (9th Cir. 1973) and is reproduced in Appendix B to this petition.

II

JURISDICTIONAL STATEMENT

The judgment of the Court of Appeals was entered September 7, 1973 and is reproduced in Appendix B to this petition. A Petition for Rehearing was denied November 21, 1973 (copy of denial is attached as Appendix C). This Court has jurisdiction to review the judgment herein by Writ of Certiorari under 28 U.S.C. §1331 and 45 U.S.C. §51.

III

QUESTIONS PRESENTED FOR REVIEW

(1) Can an employee of an independent contractor, performing unskilled railroad work which is the contractual and franchise responsibility of Southern Pacific Railroad, which is under that railroad's supervision and control and which uses that railroad's equipment and work area, be an "employee" of that railroad within the meaning of F.E.L.A.?

(2) Does Federal Rule of Civil Procedure 52(a) preclude the Appellate Court from reversing the District Court's factual conclusion unless the evidence failed, completely, to support the District Court's findings?

IV

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Code:

Title 45, Section 51:

Liability of common carriers by railroad, in interstate or foreign commerce, for injuries to employees from negligence, definition of employees.

"Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such in whole or in part from the negligence of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines,

appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

"Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter."

Title 28, Section 1331(a):

"(a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States."

Title 28, Section 1254(1)

"Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree."

Title 28, Supreme Court Rules, Rule 19(1)(b):

"1. A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. The following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons which will be considered:

"(b) Where a court of appeals has rendered a decision in conflict with the decision of another court of appeals on the same matter; or has decided an important state or territorial question in a way in conflict with applicable state or territorial law; or has decided an important question of federal law which has not been, but should be, settled by this court; or has decided a federal question in a way in conflict with applicable decisions of this court; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision."

V

STATEMENT OF CASE

Petitioner, Eugene C. Kelley, now a paraplegic, was injured July 3, 1963 when he fell from the top level of a three level railroad car while unhooking automobiles situated on the railroad car. At the time of the accident, petitioner was employed by Pacific Motor Trucking Company, a wholly owned subsidiary of Southern Pacific,[1] who had been engaged by Southern Pacific Company to unload automobiles from its railroad cars.

The rate which Southern Pacific could charge for transporting the automobiles included unloading of the automobiles (see Findings of Fact, No. IV, see,

[1]No argument is being made that the Court should "pierce the corporate veil." Under the facts of this case, the result should be the same if PMT had no legal relationship with Southern Pacific.

also, admission by Southern Pacific dated January 10, 1968 set forth on page 147 of Record on Appeal, attached hereto as Appendix D).

Petitioner had been doing this exact, unskilled job at the same location for eight years. The location and equipment was owned and controlled by Southern Pacific (see Findings of Fact. Nos. III, VI).

The responsibility for supervising and controlling the unloading operation was that of Southern Pacific Company (see Findings of Fact, Nos. VIII, VII, V).

Southern Pacific moved for Summary Judgment re questions of "employee" status and the motion was denied October 7, 1969.

The parties waived trial by jury and agreed to have the District Court act as trier of fact.

The trial court, as trier of fact, found that the petitioner was an "employee" of Southern Pacific Company for purposes of F.E.L.A. relying on Restatement, Agency 2d, §220 (see Appendix E) as provided in *Baker v. Texas & Pacific Railroad,* 359 U.S. 227 (1959); *Ward v. Atlantic Coast Line,* 362 U.S. 396 (1960); and *Smith v. Norfolk & Western Railway Company,* 407 F.2d 501 (4th Cir. 1969) (see Findings of Fact and Conclusions of Law, Appendix A).

VI

REASONS FOR GRANTING WRIT OF CERTIORARI

A. THE COURT OF APPEALS DECISION IGNORED APPLICABLE DECISIONS OF THIS COURT.

The Court of Appeals decision is directly contrary to this Court's decisions in *Ward v. Atlantic Coast Line*, 362 U.S. 396 (1960); *Baker v. Texas & Pacific Railroad*, 359 U.S. 227 (1969); *Smith v. Norfolk & Western Railway Co.*, 407 F.2d 501, cert.denied 395 U.S. 969; *Bryne v. Pennsylvania R.Co.*, 262 F.2d 906, cert.denied 359 U.S. 960.

The United States Court of Appeals for the Ninth Circuit, in reversing the trial court's opinion, stated:

> "Thus, the F.E.L.A. is applicable only when a common law master-servant relationship exists between the railroad and the person injured by its negligence. The relationship of principal and agent, which the court as trier of fact found and upon which it relied in this case does not suffice."

This holding was not supported by a single citation and is directly contrary to all existing cases of this Court and Courts of Appeals which have considered the issue.

In *Baker v. Texas & Pacific Railroad Co.*, 359 U.S. 227, 228 (1959), this Court stated:

> "The Federal Employers Liability Act does not use the terms 'employee' and 'employed' in any special sense, . . . we think it perfectly plain that the question, like that of fault or of causation under the Act, contains factual elements such as to make it one for the jury under appropriate instructions as to the various relevant factors

under law. See Restatement Agency 2d §220, comment c; § 227, comment a."

In *Ward v. Atlantic Coast Line*, 362 U.S. 820, the injured party was paid by an independent contractor. This Court, in reversing the Court of Appeals, held: (1) that the question of "employee" status was a jury question based on Restatement of Agency, §220. This Court stated:

> "However, we agree with petitioner's alternative contention that the trial judge erred in refusing to instruct the jury as requested by petitioner, . . . as to the factors to be considered by the jury in determining whether petitioner was an employee of the railroad during the performance of the work within the meaning of the Act. . . . The parties' characterization is but one factor to be considered among others, see Restatement, Agency 2d §220(2(i) and the issue is one for determination by the jury on the basis of all relevant factors. Baker v. Texas & P.R.Co., 359 U.S. 227, 3 L.ed.2d 756, 79 S.Ct. 664, supra. Reversed."

The District Court, in relying on *Ward v. Atlantic* and Restatement, Agency §220 (see Appendix A), made the following Findings of Fact:

> "IV The unloading of automobiles, the work being performed by plaintiff, at the unloading ramp of Southern Pacific Company was the responsibility of Southern Pacific Company, to be performed by it through its agents in the regular course of its business pursuant to its contractual responsibilities to the shipper and its tariff responsibilities.

"V At all times relevant to the unloading of the automobiles, Pacific Motor Trucking Co. in the unloading of the automobiles at the Southern Pacific Company ramp was acting as the agent of Southern Pacific Company.

"IX The work being performed by plaintiff on July 3, 1963 was in fulfillment of a non-delegable duty of defendant Southern Pacific Company which brought plaintiff within the traditional agency relationship, and in such relationship to defendant Southern Pacific Company as to be covered by the Federal Employers Liability Act."

Restatement, Agency §220 provides:

"A servant is a person employed to perform services *in the affairs of another,* and who with respect to the physical conduct, and the performance of the services is subject to the others control or *right* to control" [emphasis added].

To determine F.E.L.A. "employee" status, the *right* to control, even though that right is not exercised is sufficient (*Missouri-Kansas-Texas Railway Co. v. Hearson, infra,* at 1041-42; *Cimorelli v. New York Central R.Co.,* 148 F.2d 575, 577-78).

Petitioner has argued only that he was an "employee" of Southern Pacific Railroad within the meaning of F.E.L.A. according to the test set down by the United States Supreme Court in *Baker v. Texas & Pacific Railroad Co.,* 359 U.S. 227 (1959), namely Restatement, Agency 2d, §220 (reproduced as Appendix E), and *Ward v. Atlantic Coast Line,* 362 U.S. 396 (1960).

The District Court, in the case at bar, specifically relied on Restatement of Agency 2d, §220 which deals with the *master servant* relationship, and on *Baker v. Texas & Pacific Railroad Co.*, 359 U.S. 227, which expressly provides that the issue of "employee" status under F.E.L.A. is a factual issue to be determined by the application of the above Restatement (see Findings of Fact, Appendix A).

Also, the F.E.L.A. was amended in 1939 to encompass those persons who were performing interstate work and thus were defined as "being employed".[2] The District Court specifically found that petitioner was performing work "in fulfillment of a non-delegable duty of defendant Southern Pacific Company".

The District Court not only found the test of Restatement, Agency §220 had been met by the evidence but also the spirit and intent of the legislature in providing coverage to injured persons who "in any way directly or indirectly affect such commerce."

This Supreme Court has, on two previous occasions, supported the very factual and legal conclusion reached by the District Court in the case at bar (see *Smith v. Norfolk & Western Railway Co.*, 407 F.2d 501, cert. den. 395 U.S. 969; *Bryne v. Pennsylvania R.Co.*, 262 F.2d 906, cert.den. 359 U.S. 960).

In *Smith v. Norfolk, supra,* the injured party fell while unloading autos from a tri-level auto carrier.

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[2]"Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate . . . commerce; or shall, in any way directly or indirectly or closely and substantially, affect such commerce . . . shall . . . be considered as being employed by such carrier. . . ." (Aug. 11, 1939, c. 685, 53 Stat. 1404).

The Court of Appeals, in the case at bar, recognized the facts and issues were identical to *Smith v. Norfolk, supra,* yet held directly to the contrary.[3]

In referring to *Smith v. Norfolk & Western, supra,* the Court of Appeals, in the case at bar, failed to note in its citation that certiorari had been denied by the Supreme Court of the United States.

In *Bryne v. Pennsylvania R.Co.,* 262 F.2d 960, cert. den. 359 U.S. 960, the injured party was an employee of Western Electric Corp. who died while performing a one time duty of repairing a locomotive previously purchased by Penn R. Co. from Western Electric Corp.

It is submitted, the Court of Appeals, in the case at bar, not only reached an erroneous conclusion, but also misstated the record and failed to consider decisions of this Court which were not only applicable but *clearly* controlling.

B. THE COURT OF APPEALS INTENTIONALLY MADE A CONFLICT IN CIRCUIT COURT OPINIONS.

As set forth above, the Court of Appeals recognized the holding in *Smith v. Norfolk & Western, supra,* as being legally and factually identical.

The Court of Appeals, by ruling directly to the contrary, without supporting authority, intentionally created a conflict in Court of Appeals decisions.

---

[3]The Court stated: "Rather, the Court adopted a special concept of 'employment' for F.E.L.A. purposes that has found favor with the Court of Appeals for the Fourth Circuit in a case that is not significantly different from this case. Smith v. Norfolk & Western R. Co., 4th Cir., 407 F.2d 501."

Furthermore, in citing *Smith v. Norfolk & Western, supra,* the Court of Appeals ignored that portion of the citation showing this Supreme Court had refused to review the conclusion reached in *Smith v. Norfolk & Western.*

The Court of Appeals failed to mention why the District Court's reliance on *Ward v. Atlantic Coast,* supra, and *Baker v. Texas & Pacific Railroad Co.,* was erroneous despite these two decisions being the only U.S. Supreme Court decisions referred to by the District Court.

The Court of Appeals, in the case at bar, has invited a review of this Court's decision in *Smith v. Norfolk & Western* at the expense of petitioner.

C. DOES FEDERAL RULE OF CIVIL PROCEDURE 52(a) PRECLUDE THE APPELLATE COURT FROM REVERSING THE DISTRICT COURT'S FACTUAL CONCLUSION UNLESS THE EVIDENCE FAILED, COMPLETELY, TO SUPPORT THE DISTRICT COURT'S FINDINGS?

Federal Rule of Civil Procedure 52(a) restricts Appellate review of factual questions to those situations where there is a *complete* absence of evidence to support the District Court's findings *(Dennis v. Denver,* 375 U.S. 208, 210; *Atlantic & Gulf v. Ellerman Lines,* 369 U.S. 355, 359; *DeTorre v. Great Atlantic & Pacific Tea Company,* 411 F.2d 613).

Appellate review of questions of fact "must be quite restricted", and findings must stand unless

clearly erroneous *(Commissioner v. Duberstein,* 363 U.S. 278, 290-91).

The Court of Appeals not only failed to recognize that "employee" status is a question of fact but also failed to comment on the evidence or failure of the evidence to support the Findings.

Such Appellate review directly contravenes FRCP 52(a) and ignores the mandate of this Court which has clearly directed that "employee" status under F.E.L.A. is a question of fact (see *Baker v. Texas & Pacific R.Co.,* 359 U.S. 227; *Ward v. Atlantic Coast Line, supra).*

D. THE COURT OF APPEALS DECISION IS CONTRARY TO OTHER COURT OF APPEALS DECISIONS.

In addition to the acknowledged conflict with *Smith v. Norfolk, supra,* the case at bar is an anomaly for its being the first appellate reversal of a District Court's factual conclusion re "employee" status under F.E.L.A.

This decision is in direct conflict with decisions rendered in the 3rd, 4th, 6th, and 10th Circuits. All of these circuits relied on the very same authorities that were relied on by the District Court in the case at bar.

In addition to the Fourth Circuit decision in *Smith v. Norfolk, supra:*

1. In *Missouri-Texas Railway Co. v. Hearson* (CA 10th Cir.) 422 F.2d 1037 (1970) [the injured party was an employee of an independent contractor which contracted with the railroad to clean railroad cars].

2. *Bryne v. Pennsylvania R.Co.* (CA 3rd Cir.) 262 F.2d 906, cert.den. 359 U.S. 960 [employee of Westinghouse Electric Corp. died while working on locomotive purchased by Penn.R.Co.].

3. *Pennsylvania R.Co. v. Baralian* (CA 6th Cir.) 172 F.2d 710 [employee of independent contractor which had contract to unload with defendant railroad].

4. *Pennsylvania R.Co. v. Roth* (CA 6th Cir.) 163 F.2d 161 [employee of independent contractor which had contract to unload with defendant railroad].

5. *Cimorelli v. New York Central R.Co.* (CA 6th Cir.) 148 F.2d 575 [employee of independent contractor which had contract to unload with defendant railroad].

VII

CONCLUSION

The Court of Appeals, in the case at bar, has placed petitioner in a position of not having a right of review by this Court under circumstances which cry out for review. The petitioner has suffered severe injuries and under the law, aside from this Court of Appeals' decision, clearly is entitled to compensation.

The District Court, as trier of fact, applied the correct test in reaching its conclusions.

The Court of Appeals ignored the correct test to be applied both as to this case and under appropriate rules of appellate review.

The Court of Appeals decision should be vacated to create conformity and unanimity among the Circuits and avoid the anomaly created by this decision.

Dated, San Francisco, California,
February 14, 1974.

R. J. ENGEL,
LAW OFFICE
ENGEL & WARNER,
A PROFESSIONAL CORPORATION,
Attorneys for Petitioner.

(Appendices Follow)

Appendix A

In the United States District Court
for the Northern District of California

Eugene C. Kelley,	Plaintiff,
vs.	
Southern Pacific Company, a corporation,	Defendant.

[Filed—Jun 29 1970]

FINDINGS OF FACT AND CONCLUSIONS OF LAW.

From the record and the evidence the court finds:

FINDINGS OF FACT

I. Plaintiff, Eugene C. Kelley, was injured July 3, 1963, at the multi-level railroad car loading and unloading ramp of defendant, Southern Pacific Company, at 4th and Channel Streets, San Francisco, California. At such time and place, plaintiff, along with three other persons, was unchaining new automobiles for unloading when he fell from the third level of a tri-level railroad car.

II. Plaintiff and the three men he was working with at the time of his fall were hired, paid by and could be discharged by Pacific Motor Trucking Company and were in the employment of Pacific Motor Trucking Company.

III. Plaintiff had been employed at this particular job (unloading of automobiles for the Southern Pacific Company) and location on a full time basis for a period of eight years and he was paid for his services on an hourly basis.

IV. The unloading of automobiles, the work being performed by plaintiff, at the unloading ramp of Southern Pacific Company was the responsibility of Southern Pacific Company, to be performed by it or through its agents in the regular course of its business pursuant to its contractual responsibilities to the shippers and its tariff responsibilities.

V. At all times relevant to the unloading of the automobiles Pacific Motor Trucking Company in the unloading of the automobiles at the Southern Pacific Company ramp was acting as the agent of Southern Pacific Company.

VI. The record is not clear as to who supplied the hammers and ratchet wrenches used by the plaintiff in his unloading operations. The record is clear and the court finds Southern Pacific Company supplied the necessary ramps and working area required to perform the unskilled work being performed by plaintiff at the time of the injury in question.

VII. Southern Pacific Company employees had the responsibility to and were required to daily check the safety of the tri-level cars and the safety railing thereof and to make all necessary repairs.

VIII. The responsibility for immediate supervision and control of the unloading operations here in

question was that of Southern Pacific Company, even though the exercise thereof was executed by employees of Pacific Motor Trucking Company, who in such work were acting as agents of Southern Pacific Company.

IX. The work being performed by plaintiff on July 3, 1963 was in fulfillment of a non-delegable duty of defendant Southern Pacific Company which brought plaintiff within the traditional agency relationship, and in such relationship to defendant Southern Pacific Company as to be covered by the Federal Employers' Liability Act.

CONCLUSIONS OF LAW

I. At the time and place of this accident the work being performed by Eugene C. Kelley involved a non-delegable duty of the Southern Pacific Company which brought plaintiff within the traditional agency relationship to Southern Pacific Company and in such relationship to Southern Pacific Company as to be covered by the Federal Employers' Liability Act.

II. This court has jurisdiction under the Federal Employers' Liability Act, 45 U.S.C. § 51 et seq.*

Dated: June 29, 1970.

/s/ Alfonso J. Zirpoli
United States District Judge

*In making the above findings of fact and conclusions of law the court gave consideration to the rulings in *Baker v. Texas and Pacific Railroad*, 359 U.S. 227 (1959); and *Ward v. Atlantic Coast Line*, 362 U.S. 396 (1960); and *Smith v. Norfolk & Western Railway Company*, 407 F.2d 501 (1969); Restatement, Agency 2d, Section 220.

Appendix B

United States Court of Appeals
for the Ninth Circuit

Eugene C. Kelley, Appellee, vs. Southern Pacific Company, a corporation, Appellant.	No. 71-2262

[September 7, 1973]

Appeal from the United States District Court
for the Northern District of California.

Before: HASTIE,* BROWNING and WRIGHT,
Circuit Judges.

HASTIE, Circuit Judge.

This is an appeal by Southern Pacific Co., a railroad, from a money judgment recovered by Eugene Kelley, a workman, in an action for negligent injury under the Federal Employers' Liability Act, 45 U.S.C. §1.

The only matter in dispute is whether the relationship between Kelley and Southern Pacific was such as to bring the tort in suit within the coverage of the

*The Honorable William H. Hastie, senior United States Circuit Judge of the Third Circuit, sitting by designation.

F.E.L.A. By agreement of the parties, the issues, factual as well as legal, upon which liability depended were tried to the district court without a jury. After an evidentiary hearing the court entered findings of fact and conclusions of law and imposed liability on the railroad.

The controlling language of the F.E.L.A. makes a "common carrier by railroad . . . liable in damages to any person suffering injury [as a result of the railroad's negligence] while he is employed by such carrier . . . ." The disputed question here is whether Kelley was "employed by" Southern Pacific within the meaning of the statute.

Kelley was seriously injured while he was engaged in unloading automobiles from a Southern Pacific trilevel flat car after the arrival of the shipment at its San Francisco destination. In the language of the district court's finding of fact, amply supported by the evidence: "Plaintiff and the three men he was working with at the time of his fall were hired, paid by and could be discharged by Pacific Motor Trucking Company and were in the employment of Pacific Motor Trucking Company".[1] That company is a motor common carrier that operates over 15,000 route miles in the western states. Although all of its stock is owned by Southern Pacific, the Trucking Company functions as a distinct entity. Neither in the district court nor on this appeal has a case been made for piercing the corporate veil and disregarding the sepa-

[1]As a result of the accident Kelley had applied for and was awarded as a Trucking Company employee, full workmen's compensation benefits for total disability.

rate legal and functional identity of the Trucking Company. *Cf. Fawcett v. Missouri Pac. R.R.*, W.D. La. 1965, 242 F.Supp. 675, *aff'd. per curiam* 5th Cir. 1965, 347 F.2d 233, *cert. denied* 382 U.S. 907.

The relevant Southern Pacific tariff enabled a shipper of new automobiles by rail to take delivery either before or after the "grounding" of the automobiles. In this case the shipper had elected to have the automobiles grounded before delivery and had paid Southern Pacific a standard added charge for this unloading service.

The Trucking Company contracted with Southern Pacific to perform for specified unit prices such unloading of automobiles from railway cars as the railroad should require. Thus, in the unloading operation, Kelley was both performing his normal work for and assigned to him by his regular employer, the Trucking Company, and at the same time enabling the railroad to discharge its contractual responsibility to the shipper. Appropriately, Kelley was a member of the Teamsters union and not of one of the railroad craft unions.

As stated above, the district court explicitly found that Kelley was an employee of the Trucking Company. Moreover, after considering the evidence on control and supervision, the court declined to make a finding proposed by the plaintiff that Kelley was an employee of Southern Pacific. Thus, the court did not find or proceed on the basis that Kelley was either a borrowed servant, temporarily in the employment of Southern Pacific, or that he was a servant in the

employ of both companies. Rather, the court adopted a special concept of "employment" for F.E.L.A. purposes that has found favor with the Court of Appeals for the Fourth Circuit in a case that is not significantly different from this case. *Smith v. Norfolk & W. Ry.*, 4th Cir. 1969, 407 F.2d 501.

The district court reasoned, adopting the Fourth Circuit analysis, that, under its contract with the shipper, the railroad was legally obligated to have the automobiles unloaded from its cars and that in performing that work the "employees of Pacific Motor Trucking Company . . . were acting as agents of Southern Pacific Company." This led to the court's conclusion of law that "[a]t the time and place of this accident the work being performed by Eugene C. Kelley involved a non-delegable duty on the Southern Pacific Company which brought plaintiff within the traditional agency relationship to Southern Pacific Company and in such relationship to Southern Pacific Company as to be covered by the Federal Employers' Liability Act". Thus, the district court, not persuaded by the evidence that Kelley was a servant or an employee of Southern Pacific in common law conception, concluded that the "agency relation" which resulted from Southern Pacific's contracting with Kelley's employer to perform Southern Pacific's "non-delegable" contractual duty to its shipper sufficed to bring Kelley's status vis-à-vis the railroad within the F.E.L.A.

Our difficulty with this analysis begins with what the Supreme Court said in the leading case of *Baker v. Texas & Pac. Ry.*, 1959, 359 U.S. 227, 228:

> "The Federal Employers Liability Act does not use the terms 'employee' and 'employed' in any special sense, Robinson v. Baltimore & Ohio R. Co., 237 U.S. 84, 94, so that the familiar general legal problems as to whose 'employee' or 'servant' a worker is at a given time present themselves as matters of federal law under the Act."

Thus, the F.E.L.A. is applicable only when a common law master-servant relationship exists between the railroad and the person injured by its negligence. The relationship of principal and agent, which the court as trier of fact found and upon which it relied in this case does not suffice.

We are reinforced in this view by consideration that, apart from the *Smith* case in the Fourth Circuit, considered decisions in this circuit and elsewhere have rejected the contention that employees of a contractor, engaged by a railroad to perform work that is the railroad's responsibility, become railroad employees *ipso facto*. *Dougall v. Spokane, P. & S. Ry.*, 9th Cir., 1953, 207 F.2d 843 (right of way maintenance work); *Norman v. Spokane, P. & S. Ry.*, D.Ore. 1950, 101 F.Supp. 350, *aff'd. per curiam* "for the reasons given in the district court's opinion", 9th Cir. 1951, 192 F.2d 1020 (railroad bridge repair); *Tarboro v. Reading Co.*, 3d Cir. 1968, 396 F.2d 941 (unloading coal cars); *Turpin v. Chicago, B. & O. Ry.*, Mo. 1966, 403 S.W.2d 233, *cert. denied*, 384 U.S. 1003 (unloading flat cars).

It also merits mention that years ago Congress considered and rejected a proposal to include companies that provide railroad accessarial services under the

F.E.L.A. In 1939, Congress amended the F.E.L.A., 53 *Stat.* 1404, and in the process considered various proposals. One proposal would have extended coverage to suppliers of accessorial services and their employees. Its rejection, after extensive committee hearings, was announced by the Senate Judiciary Committee in reporting the bill that ultimately passed:

> "The bill as introduced was intended to broaden the application of the act to include express, freight forwarding and sleeping-car companies. Upon the hearings it was clearly shown that there is neither necessity nor demand for the inclusion of these companies in the act. Therefore, they have been excluded from the substitute." S.Rep. No. 661, 76th Cong., 1st Sess.

The result which Congress deemed undesirable and, therefore, refused to legislate directly, should not, in our view, be achieved judicially by treating employees of contractors rendering accessorial services as if they were employees of the railroad when common law analysis has failed to yield that conclusion.

The judgment is reversed.

Office of the Clerk

United States Court of Appeals for the Ninth Circuit
U. S. Court of Appeals and Post Office Building
7th & Mission Streets, P. O. Box 547
San Francisco, California 94101

Re: No. 71-2262 Eugene C. Kelley

vs

Southern Pacific Company

Dear Sir:

An opinion in the above case was filed today, and pursuant to Rule 36 of the Federal Rules of Appellate Procedure a judgment was entered SEP 7 1973 REVERSED the judgment or order of the court below (or administrative agency).

Pursuant to Rule 41(a) the mandate of this court will issue 21 days after the entry of judgment, unless the court enters an order otherwise, or grants a stay of the mandate or a petition for rehearing is filed. If a petition for rehearing is filed and denied, the mandate shall issue 7 days after the entry of the order denying the petition.

Very truly yours,

Clerk

U.S. Court of Appeals

Appendix C

United States Court of Appeals
for the Ninth Circuit

No. 71-2262

Eugene C. Kelley,
Appellee,
vs.
Southern Pacific Company,
a corporation,
Appellant.

[Filed Nov. 21, 1973]

ORDER

Before: HASTIE,* BROWNING, and WRIGHT, Circuit Judges

The panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for a rehearing in banc.

The full court has been advised of the suggestion for in banc hearing, and no judge of the court has requested a vote on the suggestion for rehearing in banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing in banc is rejected.

Dated: November 21, 1973

*Honorable William H. Hastie, Senior Judge, United States Court of Appeals for the Third Circuit, sitting by designation.

Appendix D

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123 Second Street
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Telephone: 982-9617
Attorneys for Plaintiff

In the United States District Court
for the Northern District of California

No. 45344

Eugene C. Kelley, Plaintiff,

vs.

Southern Pacific Company, a corporation, Defendant.

[Filed Jan. 10, 1968]

INTERROGATORIES PROPOUNDED BY PLAINTIFF TO DEFENDANT

TO: Defendant above named, and to CORRIGAN & ROY, its attorneys:

Pursuant to the provisions of California Code of Civil Procedure, Section 2030, you are requested to answer in writing and under oath the following interrogatories within 15 days from the time service is

made upon you. Please note that in answering these interrogatories you should furnish all information possessed by or available to the defendant, its representatives, investigators and attorneys.

1. In the deposition of Mr. Roy A. Hedlund on September 6, 1967, Mr. Hedlund stated that the rate charged by Southern Pacific Company in certain instances included the charge involved of setting the automobiles off of a tri-level auto carrier onto the abutting ground. Mr. Hedlund further stated that whether these charges are included or not depends on the point of origin and the point of destination. With regard to Mr. Hedlund's testimony, please set forth the following:

(a) What points of origin and what points of destination give rise to a charge made by defendant, SOUTHERN PACIFIC COMPANY, for the removing of automobiles from tri-level auto carriers as of July 5, 1963?

Corrigan and Roy
Attorney at Law
65 Market Street, Room 834
San Francisco, California 94105
Telephone: 362-1212
Extension: 22513
Attorneys for Defendant

In the United States District Court
for the Northern District of California

No. 45344

Eugene C. Kelley,
Plaintiff,
vs.
Southern Pacific Company,
a corporation,
Defendant.

[Filed Sep. 17, 1968]

ANSWERS TO INTERROGATORIES

COMES NOW defendant, SOUTHERN PACIFIC COMPANY, a corporation, and answers those interrogatories heretofore proposed and propounded by plaintiff. The following answers have been prepared by Donald O. Roy, attorney and agent for said defendant and are based upon his information and belief from information available to said defendant at this time. The information supplied in these answers

has been obtaind from the files of said Donald O Roy.

1) Contrary to Mr. Hedlund's impression, all rates for inbound movement of automobiles on tri-level cars in July of 1963 included the charge for including the automobiles without regard to the origin of the particular shipment.

2) Yes.

Appendix E

RESTATEMENT, AGENCY 2d

WHO IS A SERVANT

§ 220. Definition of Servant

(1) A servant is a person employed to perform services in the affairs of another and who with respect to the physical conduct in the performance of the services is subject to the other's control or right to control.

(2) In determining whether one acting for another is a servant or an independent contractor, the following matters of fact, among others, are considered:

(a) the extent of control which, by the agreement, the master may exercise over the details of the work;

(b) whether or not the one employed is engaged in a distinct occupation or business;

(c) the kind of occupation with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;

(d) the skill required in the particular occupation;

(e) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work;

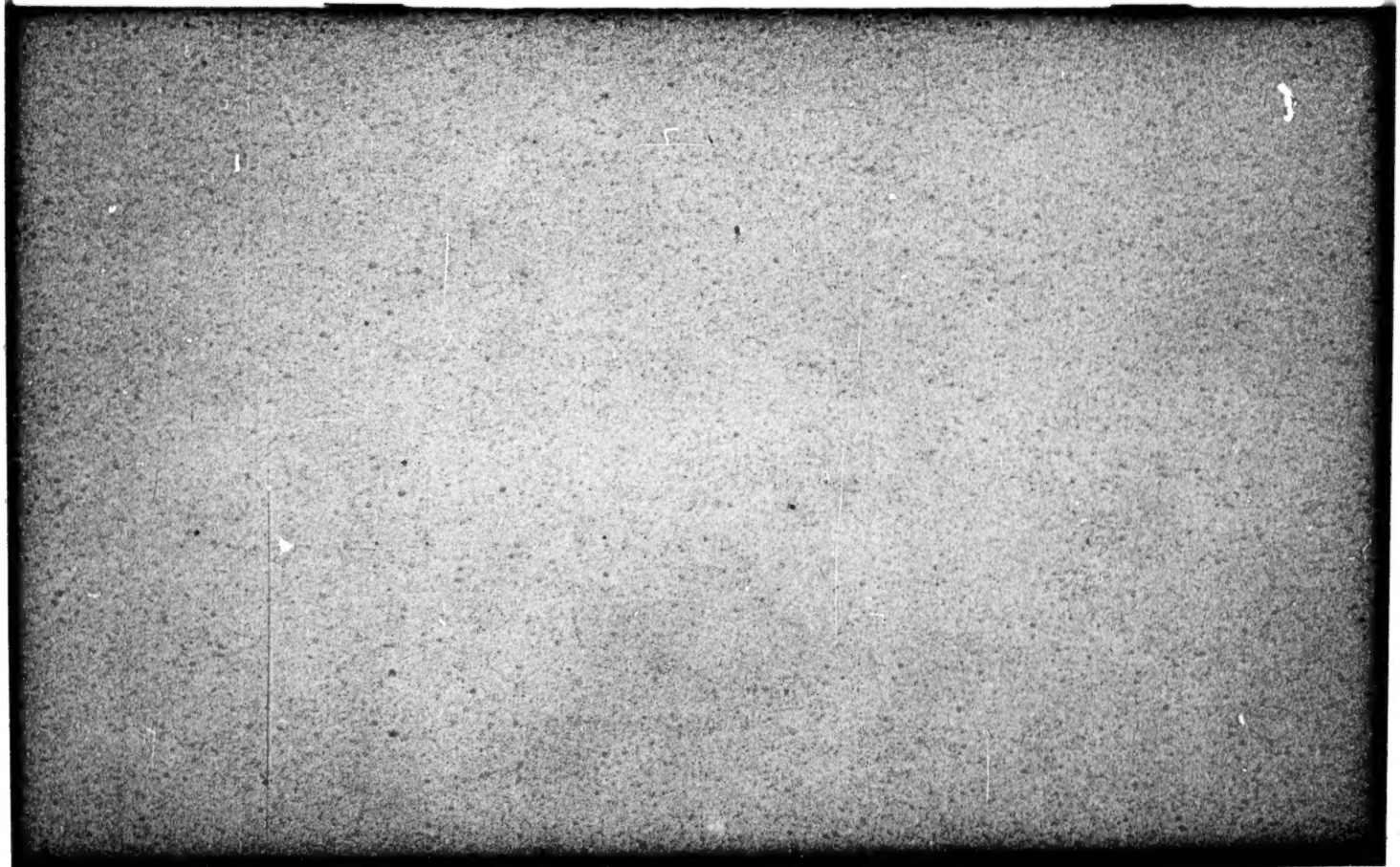
(f) the length of time for which the person is employed;

(g) the method of payment, whether by the time or by the job;

(h) whether or not the work is a part of the regular business of the employer;

(i) whether or not the parties believe they are creating the relation of master and servant; and

(j) whether the principal is or is not in business.



COURT, U. S.

Supreme Court, U. S.
FILED
MAR 18 1974
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1270

EUGENE C. KELLEY,
Petitioner,

vs.

SOUTHERN PACIFIC COMPANY, a corporation,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Brief for Respondent in Opposition

JOHN J. CORRIGAN
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March 14, 1974

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In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1270

EUGENE C. KELLEY,
Petitioner,

vs.

SOUTHERN PACIFIC COMPANY, a corporation,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Brief for Respondent in Opposition

OPINION BELOW

The opinion of the Court of Appeals for the Ninth Circuit is reported at 486 F.2d 1084 (9th Cir. 1973).

JURISDICTION

Contrary to the date set forth in the petition, the judgment of the Court of Appeals for the Ninth Circuit was entered September 7, 1973. A timely petition for rehearing with suggestion for rehearing *en banc* was denied and

rejected November 21, 1973, no judge of the court having requested a vote on the suggestion for rehearing *en banc.* Contrary to the code section cited in the petition, we believe this court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Whether the scope of the plaintiff-class of the F.E.L.A. shall be enlarged to include the employees of agents of common carrier railroads.

STATUTE INVOLVED

The text of the Federal Employers' Liability Act set forth in the petition omits several lines near the end of the quotation. The pertinent provisions of the Federal Employers' Liability Act (45 U.S.C. § 51, hereafter sometimes "the Act" or the "F.E.L.A.") read as follows:

> "§ 51. Every common carrier by railroad while engaging in commerce between any of the several States . . . shall be liable in damages to any person suffering injury *while he is employed* by such carrier in such commerce, or, in case of the death of such employe, to his or her personal representative, . . . for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment. . . ." 45 U.S.C. § 51 enacted Apr. 22, 1908, c. 149, § 1, 35 Stat. 65; Aug. 11, 1939, c. 685, § 1, 53 Stat. 1404 (Emphasis supplied)

STATEMENT OF THE CASE

The basic framework of this case has to do with the scope of the plaintiff-class of the F.E.L.A. The Act, by its terms, confines the plaintiff-class to *employees* of common carrier

railroads (and representatives of deceased employees). The plaintiff here, however, was an employee of a trucking company. He was injured while working on a railroad car, situated on railroad property. The district court found the trucking company to be an *agent* of the defendant. On that basis (that the plaintiff was an *employee* of an *agent*), the district court extended coverage of the Act to plaintiff, citing as authority a decision of the Fourth Circuit. The Ninth Circuit, disagreeing with the Fourth Circuit, reversed. The facts are set forth in more detail in the next paragraphs.

The operations of the rail industry are closely interrelated with many other operations—those of its suppliers, those performing services on its premises (coal loading, grain inspection, protective service for perishables, etc.), its shippers and consignees, other railroads, those performing services to or on cars, and a host of terminal and accessorial operations.[1] As this Court has noted, ". . . there exist a number of activities and facilities which, while used in conjunction with railroads and closely related to railroading, are yet not railroading itself." (*Edwards v. Pacific Fruit Express Co.*, 390 U.S. 538 (1968).)

An often litigated question is whether the employees of such firms, when injured, are eligible for a Federal Employers' Liability Act suit against the common carrier railroad. In fact there are literally hundreds of appellate decisions on the question. This case presents that problem as it arises in the interface of the rail industry with the accessory service of loading and unloading of vans on flat-

1. A.L.R. observes: "It is a frequent occurrence that employees of other companies work on or about railroads. For instance, various loading and unloading jobs, maintenance, and construction of new facilities are handled for the railroads by subcontractors." (30 A.L.R.2d 517 at 518 (1953))

cars (piggyback service) and unloading of automobiles on bi-level and tri-level auto rack cars (multilevel service).

Nationally, from the inception of piggyback and multilevel transportation these ramping and deramping services have predominantly been performed by teamster personnel working for trucking companies.[2] They have not been performed by railroad personnel working in any of the various rail craft classifications. In the present case, the district court explicitly found the plaintiff had been doing this type work "for a period of eight years" prior to his injury (1963), i.e., from the inception of piggyback service on Southern Pacific. (Finding III and reporter's transcript from the district court, p. 356 and following.)[3] Pacific Motor Trucking Company (hereafter sometimes referred to as "PMT") was the company hired to do that work in the present case.

The plaintiff, Eugene C. Kelley, was injured July 3, 1963, in San Francisco, while unchaining new automobiles from the top level of a railroad tri-level car, preparatory to unloading the autos. The district court found the normal incidents of employment—hiring, payroll, power to discharge—existed between Kelley and Pacific Motor Trucking Company. The district court explicitly found Kelley was "in the employment of Pacific Motor Trucking Company". (Finding II.) Contrary to the assertion in the last paragraph on page 6 of the petition, there is no finding in which the district court found Kelley to be "an 'employee' of Southern Pacific". In fact, as will be related shortly, the

2. See description in *Turpin v. Chicago B. & Q. R.R.*, 403 S.W. 2d 233 (Mo. 1966), p. 234.

3. The reporter's transcript will hereafter be referred to as "R.T." Portions of the transcript have two page numbers—a typed number and a stamped number. Our references will be to the stamped number.

district court *rejected* a conclusion of law framed in *exactly* these words. (See motion and order for modification of the record in the Ninth Circuit proceedings.)

Kelley retained attorneys and applied for and received workmen's compensation and medical care from Pacific Motor Trucking Company. The attorneys, however, neglected to see the obvious common law suit against this defendant. The anniversary date of one year—the period fixed by California law for limitation of negligence and product liability suits—came and went, without any suit having been filed. Two years came and went. Three days short of three years, the F.E.L.A. limitation period, this suit was filed. It alleges an employment relationship between Kelley and the defendant Southern Pacific Company.[4]

The pertinent proceedings in the suit were as follows: pursuant to stipulation at pre-trial the case was bifurcated, with trial of the sole issue of the existence of an employment relationship to be held first, before a judge. In due course trial on this phase commenced before The Honorable Alfonso J. Zirpoli. At the conclusion of the initial phase, the court announced the intention to rule for plaintiff and adopted Findings of Fact and Conclusions of Law which are the subject of discussion in the first section of our argument.

Following completion of this initial phase of trial the parties, at a later date, stipulated in open court as to remaining issues (including damages) and judgment was granted and entered accordingly.

The Ninth Circuit reversed the judgment of the district court.

---

4. In a separate count it also alleged an alter ego theory vis a vis PMT and respondent. This theory was abandoned in the district court and is specifically abandoned here—see footnote, p. 5 of petition.

ARGUMENT

I. The Threshold Problem of the District Court's Findings.

The petition raises an unarticulated problem of whether the district court found Kelley to be an employee of Southern Pacific. Petitioner asserts that it did. The Ninth Circuit did not think so:

> "Thus, the district court, not persuaded by the evidence that Kelley was a servant or an employee of Southern Pacific in common law conception, concluded that the 'agency relation' . . . sufficed . . .".

The problem of whether the district court found Kelley to be an employee can be quickly resolved. It does not take a genius to read the Findings of Fact and Conclusions of Law. Doing so, one observes:

i. there is an *explicit* finding of "employment" by one entity: "Plaintiff and the three men he was working with . . . were in the employment of Pacific Motor Trucking Company." (Finding II)

ii. there is no finding of *"employment"* by any other entity.

iii. the normal incidents of employment—the power to hire and fire, and the payment of wages—are *explicitly* found to exist in regard to Kelley and PMT: "Plaintiff and the three men he was working with . . . were hired, paid by and could be discharged by Pacific Motor Trucking Company . . .". (Finding II)

iv. there are no such findings concerning any other entity.

v. there are no findings of joint employment, borrowed servant, or any of the other possibilities by which one in the service of one employer enters the service of another employer.

It seems hard, from a plain reading of the findings, to escape the conclusion the district court found Kelley to be

an employee of PMT and of no one else. There are, however, three additional factors which inescapably point toward that conclusion:

i. the issue of "employment" was framed by the pre-trial order as the sole issue before the court; moreover, the question was repeatedly briefed and urged before the court. The court was thoroughly educated on the issue,[5] and knew that employment by a common carrier railroad was an essential element of Kelley's case, *according to any conventional understanding of the Act.*

ii. most important of all, the parties submitted Proposed Findings of Fact and Conclusions of Law. Plaintiff offered a Conclusion which *explicitly stated* that:

"The plaintiff, Eugene C. Kelley, was an 'employee' of defendant Southern Pacific Company as set forth in *Baker v. Texas and Pacific Ry. Co.*, 359 U.S. 227 (1959), and *Ward v. Atlantic Coast Line*, 362 U.S. 396 (1960)."

A hearing was held in chambers at which the findings were settled. The court *refused* to adopt the foregoing statement, or any similar statement.

---

5. The following colloquy occurred at the start of trial:

"THE COURT: May I ask you a question? If your theory is correct, why do you need this evidence? If your theory of pickup and delivery and your operational theory is correct, why do you need any of this evidence of control?

MR. ENGEL: Well, Your Honor, what our purpose in putting the evidence on is to actually anticipate any argument that the defense may have with regard to the Smith case. In other words, we intend to show, and I think the interrogatories in fact, and the depositions, show as much factual basis for decision as existed in the Smith case.

THE COURT: Well they would be justified in the sense of putting that evidence on for the purpose of showing that there is no control, number one, under the borrowed servant doctrine. But I don't know what purpose it would serve for them if the very nature of the business transaction makes the trucking company the agent. What difference does it make whether there is any control or not? I am just asking the questions." (R.T. 4 and 5)

iii. the district court instead adopted the following Conclusion of Law:

> "I. At the time and place of this accident the work being performed by Eugene C. Kelley . . . brought plaintiff within the traditional agency relationship to Southern Pacific Company and in such relationship to Southern Pacific Company as to be covered by the Federal Employers' Liability Act."

In a footnote the district court states:

> "In making the above findings of fact and conclusion of law the court gave consideration to the rulings in *Baker v. Texas and Pacific Railroad,* 359 U.S. 227 (1959); and *Ward v. Atlantic Coast Line,* 362 U.S. 396 (1960); and *Smith v. Norfolk and Western Railway Company,* 407 F.2d 501 (1969); . . ."

In comparing the Conclusion of Law proposed by petitioner with that adopted by the district court, (ii and iii above) one sees two principal changes:

i. the court changed the wording, "Kelley was an employee . . ." to read, "brought plaintiff within the traditional *agency* relationship . . ." (emphasis ours), and

ii. the court added a citation in the footnote to those offered by petitioner (in his proposed conclusion), namely, the case of *Smith v. Norfolk and Western, supra,* the very case which (as will be pointed out hereafter) adopts the formula of "employee of an agent".

Thus, both from a plain reading of the Findings and from comparison of the Proposed Conclusion with the Conclusion as adopted, one must conclude that the threshold issue of "what the district court found" was correctly resolved by the Ninth Circuit. Alternatively, if petitioner's position is to be examined, the only legal issues then before this

Court concern the rules to be applied in interpreting court findings, and concomitant matters, e.g., who has the burden of proof on the issue of employment, etc. These are issues which:

i. were not briefed or urged below;
ii. do not present a conflict in the circuits; and
iii. do not present questions of importance worthy of this court's review.

II. The Decision in Conflict Is Clearly Wrong.

The basis for the district court's ruling in favor of plaintiff is a 1969 decision of the United States Court of Appeals for the Fourth Circuit, *Smith v. Norfolk and Western Ry.*, 407 F.2d 501 (4th Cir. 1969), cert. den'd., 395 U.S. 979, a case which is genuinely conflicting with the present case, both in decision and principle. Moreover, the factual setting of *Smith* is exactly parallel to the present case, i.e., a teamster employee of a trucking company fell from the top level of a tri-level rail car while unchaining automobiles preparatory to unloading them. The trucking company was acting as the agent of the railroad in "grounding" the autos —i.e., in driving them off the multilevel cars to the ground.

After reciting the facts, the *Smith* court in the second paragraph articulates the legal premise underlying the entire opinion:

> ". . . if the injured worker is employed by an *agent* . . . of the railroad he will be treated as an employee . . . for purposes of the Act." (p. 502, emphasis supplied.)

The remainder of the opinion is devoted—not to an explication of the underlying legal premise—but rather to reasons why the district court's finding of agency was "not erroneous". It would take a complete brief in itself to point out the errors in this portion of the opinion, but that is not necessary at this stage. The quarrel is with the basic

premise—that employees of agents are within the plaintiff-class. That proposition is wrong for the following reasons:

1. It is contrary to the wording of the statute. The plaintiff-class of the F.E.L.A. is clearly set out by the statute: it is confined to employees, and the personal representatives of deceased employees. It does not include "agents" or "employees of agents". The limited scope of the plaintiff-class can best be understood by comparing it with the class with which it is juxtaposed: the class of persons for whose acts the carriers are made liable. The Act makes carriers liable for negligence of "the officers, agents, or employees of such carrier." (45 U.S.C. § 51.) Each word in that phrase changed or substantially modified a rule of law. The references to "officers" and "employees" abolished the fellow servant rule.[6] The reference to liability for "agents" changed another common law rule, i.e., the rule of no liability for the acts of non-servant agents. (Restatement of Agency 2d § 250.) In short, the inclusion of each word was deliberate, not mere phrase-making.

Moreover, the Employers' Liability Act of 1906, 32 Stat. 232, (held unconstitutional in The Employers' Liability Cases, 207 U.S. 463 (1908)) applied to every common carrier—not just railroads. (See p. 497 for discussion.) This feature was changed in the 1908 version of the Act.

Thus, the contrasts between the 1906 and 1908 Acts, and between the plaintiff-class and the class for whose acts the carriers were liable, make clear the limited scope of the plaintiff-class. The omission of "agents" in the plaintiff-class is plain, conspicuous and intentional.

---

6. See Restatement of Agency 2d, § 509, Comment a. Even superintendents were fellow servants, and there was generally no liability for negligent supervision in the operative details of the work. The reference to "officers" changed that situation.

2. The proposition that employees of agents are within the plaintiff-class is without sanction in the decisions of this Court. There is no construction of the Act by this Court which would justify such a result. On the contrary, from the earliest cases (e.g., *Robinson v. Baltimore & Ohio R.R.*, 237 U.S. 84 (1915)), to the last treatment of the problem (*Baker v. Texas & Pac. R.R.*, 359 U.S. 227 (1959); *Ward v. Atlantic Coast Line R.R.*, 362 U.S. 396 (1960)), this Court, in construing the plaintiff-class, has repeatedly stated the concept of "employment" is not a special one, i.e., one which would embrace employees of agents, but the orthodox one. In the *Robinson* case (237 U.S. 84) the plaintiff was a Pullman Company employee (a porter), attempting to sue the common carrier railroad on whose trains he worked. The Court notes:

> "We are of the opinion that Congress used the words 'employe' and 'employed' in the statute in their natural sense and intended to describe the conventional relation of employer and employe. It was well known that there were on interstate trains persons engaged in various services for other masters. Congress, familiar with this situation, did not use any appropriate expression which could be taken to indicate a purpose to include such persons among those to whom the railroad company was to be liable under the Act." (p. 94)

Thus, there is no warrant in the decisions of this Court for the special concept of employment adopted by the *Smith* Court, viz.: the concept of "employment" as including "employees of agents".

3. The authorities cited by the *Smith* Court do not stand for the proposition cited. The *Smith* decision relies on three cases from the Sixth Circuit: *Cimorelli v. New York Cent. R.R.*, 148 F.2d 575 (6th Cir., 1945); *Pennsylvania R.R. v. Roth*, 163 F.2d 161 (6th Cir. 1947); and, *Pennsylvania R.R.*

v. Barlion, 172 F.2d 710 (6th Cir. 1949). On examination each of these cases will be seen to adopt the orthodox analysis requiring *employment.* They are, perhaps, startling results for a defense oriented lawyer, but nevertheless the rationale is conventional—i.e., the injured person is found to be an *employee* of the common carrier railroad.[7] There is not one iota of support in any of the three decisions cited by the *Smith* court for the proposition that being an employee of a railroad's agent—as opposed to being an employee of the railroad itself—is sufficient to invoke coverage of the F.E.L.A. In fact, there is no discussion of agency at all. However broad a concept of employment these cases stand for, they do not stand for the proposition that the nexus of employment can be done away with and replaced by employment by an entity other than the common carrier.

Thus, even without full dress analysis, *Smith v. Norfolk and Western Ry.* can be fairly characterized as clearly wrong, in that its central premise is contrary to the plain meaning of the Act, is not supported by decisions of this Court and is not even supported by the authorities cited for it.

III. The Decision Below Is Clearly Correct.

Although there are a multitude of appellate decisions on the subject of when one becomes an employee for F.E.L.A. purposes, the Ninth Circuit citations represent a particularly thoughtful selection on the subject. The cornerstone of the opinion is *Baker v. Texas & Pac. R.R.,* 359 U.S. 355 (1959), the leading case. Additional authority includes two prior Ninth Circuit cases in which the plaintiffs were, respectively, repairing a railroad bridge and maintaining a roadbed, *Norman v. Spokane P. & S. Ry.,* 101 F.Supp. 350 (D. Ore. 1950), affirmed *per curiam* 192 F.2d 1020 (9th Cir.

7. These cases are also obvious examples of one circuit following its own precedents.

1951), and *Dougall v. Spokane P. & S. Ry.*, 207 F.2d 843 (9th Cir. 1953). These cases are important, among other reasons, because the plaintiffs were doing work which is traditional railroad work—i.e., maintenance of structures and way. The legal theories discussed are similar to those suggested in the present case.

The *Turpin* case cited by the Ninth Circuit (*Turpin v. Chicago B. & Q. Ry.*, 403 S.W.2d 233 (Mo. 1966), cert. denied, 384 U.S. 1003) is a leading case in a factual setting similar to that of the present case. Thus, reliance is especially well placed on the authorities cited by the Ninth Circuit.

A second aspect of the decision below that merits discussion here has to do with the statutory history of the 1939 amendments to the Act. This is dealt with in the last paragraph of the court's opinion. Not only is the history there recited correct, but a wealth of additional material supports it, including the following:

i. In the decade of the 1930's Congress enacted the basic labor relations and social insurance legislation for the rail industry. In each of these acts, Congress *included* railroad-owned companies which performed services in connection with the transportation of property by railroad. But, Congress specifically *excluded* from such coverage "trucking service." Congress thus accorded a separate legislative treatment not only to the peripheral industries (by inclusion) but *especially* to railroad-owned trucking companies furnishing services in connection with railroad operations (by exclusion). (Non-railroad-owned companies performing such services were not within the scope of the acts anyway.) See the "(other than trucking service)" exclusion in the Railway Labor Act, 45 U.S.C.

§ 151. First; Railroad Retirement Act of 1937, 45 U.S.C. § 228a(a); Carriers Taxing Act of 1937, 50 Stat. 435 § 1, Internal Revenue Code of 1954, 26 U.S.C. § 3231(a); Railroad Unemployment Insurance Act, 45 U.S.C. § 351(a). This is the background against which Congress considered the proposed amendments to the F.E.L.A. in 1939—i.e., a decade of recognition and separate legislative treatment of teamster performed terminal services.

ii. In testimony on the effect of the 1939 amendments in broadening the scope of the F.E.L.A. there was *specific* explanation to the senators of the existence of "companies which are subsidiaries of railroads . . .". Following a question whether the proposed amendment would "include the subsidiaries, these truck lines owned by the railroads?", the assurance was given by the witness (the General Counsel of the Railroad Trainmen): "no." (citation following)

iii. At a later point in the testimony the same witness (McGrath) and another witness assured the senators that the representative of the Teamsters stated that "he was very much opposed" to inclusion, and "did not want to have the teamsters brought under the act . . .". (Hearings on S.1708—Before the Subcommittee of the Committee on the Judiciary, 76th Cong., 1st Sess., pp. 3, 56, 57, (1939).)

Thus the detail of the legislative history is much stronger and much more explicit than is discussed in the Ninth Circuit's opinion.

This history has been repeatedly briefed and urged. Petitioner has yet to respond to it. We challenge petitioner in his reply brief to point out the inapplicability of this legislative history. If he will not do so, this Court should take it as an acknowledgement that it is correct.

In summary, in terms of clarity of analysis and expression, in terms of apt consideration of authority, in terms of judicious consideration of all aspects of the matter, including the statutory history, the Ninth Circuit's opinion and decision can only be characterized as clearly correct.

IV. There Is No Question of Federal Law Which Needs to Be Reviewed by the Court at This Time.

Several miscellaneous contentions of petitioner ought to be examined:

Petitioner appears to argue that the denial of certiorari for *Smith v. Norfolk and Western* constitutes approval.[8] Such an argument is patent nonsense in view of this Court's often repeated statements to the effect that "the denial of a writ of certiorari imports no expression of opinion upon the merits of the case, as the bar has been told many times." (*United States v. Carver*, 260 U.S. 482 (1923).)

Petitioner argues (p. 10) that the "spirit and intent" of the 1939 amendments to the Act was to extend the suit to anyone injured while "performing interstate work". This astonishing argument clearly overlooks the fact that the 1939 amendments rejected any change in the plaintiff-class (as detailed earlier) and dealt only with the problems created by the so-called "moment of injury" test. The amendments thus left intact the requirement of *employment*, but eliminated distinctions based on whether the particular traffic was in intrastate or interstate commerce. This Court's construction of the 1939 amendments is found in *Reed v. Penn. R.R.*, 351 U.S. 502 (1955), and *Southern Pacific Co. v. Gileo*, 351 U.S. 493 (1955).

---

8. Petitioner also relies on denial of *certiorari* in another case viz.: *Byrne (sic) v. Pennsylvania R. Co.*, 262 F.2d 960. We do not attempt to analyze *Byrne* since it also relies upon an orthodox employment relationship analysis for its result.

The reason for mentioning these arguments at all is simply to point out their frivolous and insubstantial character. The overriding fact of this petition is the complete failure to analyze, discuss and support the rationale of the *Smith* case. Not one argument of substance is advanced in favor of the expanded *Smith* formulation of the plaintiff-class! If the petitioner himself cannot defend the *Smith* decision, there is no danger that any of the other circuits or appellate courts of the country will be mislead—in view of the compellingly correct decision of the Ninth Circuit. That is why we urge that certiorari be denied here—there is no reason to suppose other courts will adopt the erroneous *Smith* view, and there are no other questions of substance raised by this petition.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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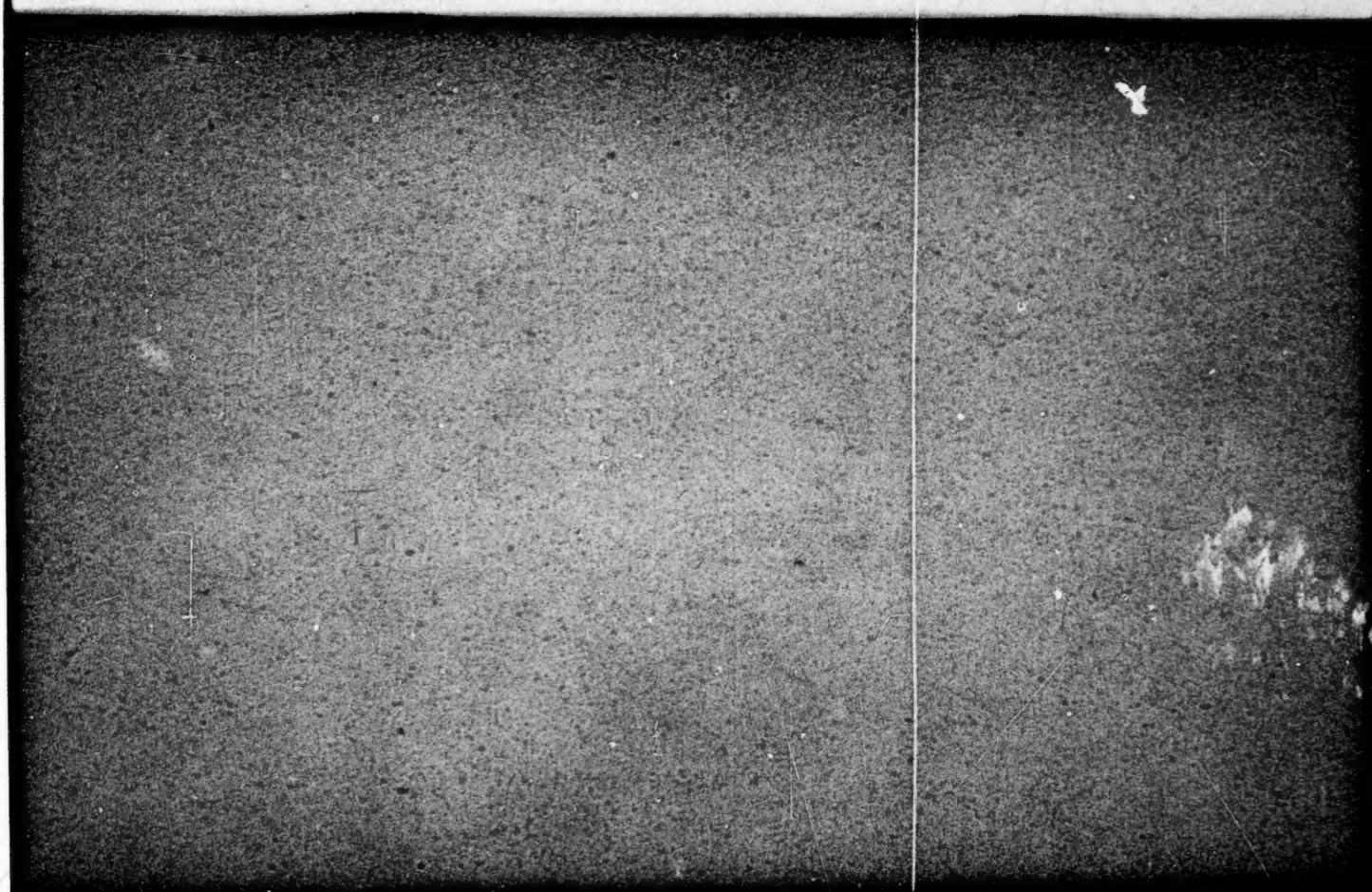

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MICHAEL RODAK, JR., C

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1973

No. 73-1270

EUGENE C. KELLEY,
Petitioner,

VS.

SOUTHERN PACIFIC COMPANY, a corporation,
Respondent.

BRIEF OF PETITIONER

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No. 73-1270

EUGENE C. KELLEY,
Petitioner,

VS.

SOUTHERN PACIFIC COMPANY, a corporation,
Respondent.

BRIEF OF PETITIONER

I

OPINION BELOW

The opinion of the Ninth Circuit Court of Appeals is reported in 486 F.2d 1084 (1973) (Jt.App. 32).[1]

The denial of petitioner's petition for rehearing en Banc pursuant to Federal Rules of Appellate Procedure 35(b) is found at Jt.App. 39.

[1]The appendix agreed to by petitioner and respondent and printed in a separate pamphlet is referred to herein as "Jt.App.". The appendices at the end of this brief are referred to as Appendix A, Appendix B and Appendix C.

The findings of fact and conclusions of law made by the District Court for the Northern District of California are found at Jt.App. 28.

The Judgment of the District Court for the Northern District of California is found at Jt.App. 31.

II

JURISDICTION

The opinion of the United States Court of Appeals for the Ninth Circuit was entered September 7, 1973 (Jt.App. 32).

On November 21, 1973, the United States Court of Appeals for the Ninth Circuit denied petitioner's request for a rehearing en banc (Jt.App. 39).

On February 14, 1974, petitioner sought a Writ of Certiorari, alleging jurisdiction based on Title 28, Section 1331a, Title 28, Section 1254(1), Title 28, Supreme Court Rules, Rule 19(1)(b).

The Petition for a Writ of Certiorari was granted on April 15, 1974.

III

QUESTIONS PRESENTED

(1) Can an employee of an independent contractor, performing unskilled railroad work which is the contractual and franchise responsibility of Southern Pacific Railroad Company, which is under that rail-

road's supervision and control and which uses that railroad's equipment and work area, be an "employee" of that railroad within the meaning of F.E.L.A.?

(2) Does Federal Rules of Civil Procedure 52(a) preclude the Appellate Court from reversing the District Court's factual conclusion regarding F.E.L.A. "employee" status unless the evidence failed, completely, to support the District Court's findings?

IV

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Code:

Title 28, FRCP 52:

> . . . Findings of Fact shall not be set aside unless clearly erronious, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witness.

Title 45, Section 51:

> Liability of common carriers by railroad in interstate or foreign commerce, for injuries to employees from negligence, definition of employees.
>
> "Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation

or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such in whole or in part from the negligence of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

"Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter."

Title 28, Section 1331(a):

"(a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States."

Title 28, Section 1254(1):

"Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree."

Title 28, Supreme Court Rules, Rule 19(1)(b):

"1. A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. The following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons which will be considered:

"(b) Where a court of appeals has rendered a decision in conflict with the decision of another court of appeals on the same matter; or has decided an important state or territorial question in a way in conflict with applicable state or territorial law; or has decided an important question of federal law which has not been, but should be, settled by this court; or has decided a federal question in a way in conflict with applicable decisions of this court; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision."

V

STATEMENT OF CASE

Petitioner, Eugene C. Kelley, now a paraplegic, was injured July 3, 1963 when he fell from the top level of a three level railroad car while unhooking

automobiles situated on the railroad car. At the time of the accident, petitioner was employed by Pacific Motor Trucking Company,[2] a wholly owned subsidiary of Southern Pacific,[3] who had been engaged by Southern Pacific Company to unload automobiles from its railroad cars.

At the time the accident in question occurred, the petitioner, Eugene C. Kelley, was unhooking an automobile in order that it could be unloaded (Jt.App. 130-131). This procedure was part of the preparatory stage. This preparatory stage included the unhooking procedure, lowering of ramps that connected the railroad cars, and raising the safety railings which were affixed to the railroad cars and which were intended to protect individuals who would be unloading vehicles from the railroad cars (Jt.App. 59-60; 76).

The petitioner, Eugene C. Kelley, was injured during this preparatory stage and prior to the actual driving or unloading of the vehicles (Jt.App. 130-131).

The accident occurred to petitioner while in the process of reaching underneath an automobile in order to unhook chains which were used to maintain the vehicle in a stationary position during transportation. These chains were permanently attached to the railroad car (Jt.App. 56, 59). They were loosened by

---

[2]The paycheck received by personnel unloading automobiles read "Pacific Motor Trucking, wholly owned subsidiary of Southern Pacific" (Jt.App. 70).

[3]No argument is being made that this Court should "pierce the corporate veil."

a ratchet which was also affixed to and a part of the railroad car (Jt.App. 59, 78).

Petitioner fell over the side of the top level of the railroad car, which car failed to have its safety railing in a raised position due to a defective hook (Jt. App. 63).

Petitioner had been doing this exact, unskilled job of unloading automobiles, which were being transported by Southern Pacific Company, for eight years (Jt.App. 131). During this time, all the work was done at the same location which was owned and controlled by Southern Pacific Company, using equipment owned by Southern Pacific Company (Jt.App. 126, 127, 128, 129).

The rate which Southern Pacific Company was *allowed* to charge, pursuant to its franchise, for transporting the automobiles included the unloading of automobiles as was being done by petitioner, Eugene C. Kelley (Jt.App. 5-8, 128).[4]

The responsibility for supervising and controlling the unloading operation of the automobiles was that of Southern Pacific Company (Jt.App. 29-30, Finding of Fact VIII).

Respondent, Southern Pacific Company, treated the personnel at this unloading operation as Southern Pacific "employees" as distinguished from personnel of Pacific Motor Trucking Company who drove trucks

[4]The Ninth Circuit Court of Appeals unfortunately relied on a citation by respondent, Southern Pacific Company, to (R.T. 467) as support for the proposition that unloading charges were "optional." This citation was completely inaccurate (See Appendix C).

or other operations outside of the auto-loading process. 45 U.S.C. §1(7) provides that only "employees" of the railroad may be issued free railroad passes. Each individual who testified at the trial, including plaintiff (p. 440:5) testified that he either had a permanent or had been issued a temporary free railroad pass, the authority for which could only come under 45 U.S.C. §1(7) (Jt.App. 44; 69-70; 89; 134; 143).

Southern Pacific Company supervisors directly and indirectly participated in managing and directing the automobile unloading process.

The instruction, direction, and supervision by Southern Pacific Company, included a booklet prepared by Southern Pacific Company who distributed 1,000 to "new employees." This booklet was designed and distributed to the men who actually unloaded the automobiles (Jt.App. 114-115). Mr. Elwood Jarvis, the supervisor of Damage Prevention Loading Service for Southern Pacific Company, testified regarding his duties in connection with the automobile unloading process at the time of the accident.

> "Mr. Engel: "Q. Now, when you go to the fourth and Channel Street piggyback area, or have in the past, either as an assistant supervisor or a supervisor, do you have any verbal contact with the men themselves who work on the tri-level cars?
>
> "A. Yes.
>
> "Q. And in what way? In other words, what do you do with them?
>
> "A. Well, on loading of vehicles at Fourth and Channel Street, foreign vehicles, we have to

devise a method of adapting the tie-downs on our rail cars to handle foreign automobiles in order that we can carry them by rail without damaging these cars. So we go out and we test load various types of foreign cars and experiment with tie-downs on the vehicles. And we have to have the assistance of the P.M.T. employees to make the various adjustments and tie-downs on the cars for test purposes. So we discuss with them, get underneath the vehicles, or find where on the vehicles we can secure chains, and then make a schematic drawing of the tie-down. They will load the car. We will send a wire to the destination and ask that carrier to make an out-check to see if there was any damage as a result of the tie-downs.

"Q. Now, when you do this, are you in effect showing them where to hook it and so forth?

"A. Correct.

"Q. And this is direct with the men who are actually doing it?

"A. Correct.

"Q. And they follow your instructions in this regard?

"A. They offer advice, too.

"Q. But they also follow your instructions?

"A. Yes. It's a mutual thing. We try to devise the best location" (Jt.App. 117-118).

He also testified that damage to the automobiles occurring during the unloading process was an expense of Southern Pacific Company and their responsibility (Jt.App. 115). Other members of his department also were involved in checking the unloading process including Dick Schriber (Jt.App. 115-116).

Mr. Jarvis was the individual who drafted and distributed, on behalf of Southern Pacific Company, the booklet which he stated was "designed" for "new employees." (See Exhibits 10 and K). Mr. Jarvis stated that the purpose of this booklet which he distributed was to instruct these individuals on how to unload the automobiles (Jt.App. 114-115). Mr. Jarvis admitted he personally physically participated in showing the crew members how to unhook the automobiles (Jt.App. 117-118).

This instructional booklet contained the following rather explicit directions from Southern Pacific Company to the members of the crew involved in the unloading of the automobiles (Jt.App. 80-82):

SAFETY

"Safety of personnel and equipment must be the first consideration. Authorized signs reading 'employees working', white lettering on red background, must be placed at the end of the last rail car before loading or unloading crews start work on each track. Signs must be removed after work is completed and cars ready for movement. White light is to be attached to this sign when used at night. Raise safety rail before working on top deck of rail cars. Do not exceed five miles per hour when driving on rail cars and twenty miles an hour in parking areas. Spring action resulting from excessive speed on rail cars can damage tops and underframes of vehicles. Slower speeds must be observed when necessary for safety. When it is necessary to ascend or descend ladders on rail car, always face the car. Watch your step at all times when on or around cars and

transports. Never throw tools from decks of rail cars or transports to the ground. Make sure bridge plates are raised and locked before rail car is moved." (See petitioner's Exhibit 10, p. 2).

UNLOADING

"When unloading, observe the safety and general rules in the front part of this booklet, being particularly careful to avoid possible roof and underbody damage when driving through rail cars. Always use seat and floor protectors. Park vehicles carefully, closing hoods, deck lids, doors, windows, heater vents and door vent windows, and turning off electrical accessories and lights. Use only wrenches furnished to release rachets. Hammering on ratchet assemblies as an expedient to release chains is prohibited. Hooks must be removed from vehicles by hand." (See petitioner's Exhibit 10, p. 9).

Two fellow crew members of petitioner testified regarding their experiences in receiving directions and instructions from rspondent, Southern Pacific.

Cornelius Oosterbaan testified that he received a copy of the instruction booklet distributed by Southern Pacific Company, excerpts of which are quoted above (Jt.App. 83, 79-80). When he was asked to do something by Southern Pacific personnel, he complied because they were Southern Pacific personnel (Jt.App. 85-86). He quite often saw Elwood Jarvis and followed the instructions and directions that Mr. Jarvis gave (Jt.App.64-65) and that Mr. Jarvis, himself, physically participated in demonstrating to the crew how to unhook the automobiles (Jt.App. 65-66).

Mr. Jarvis was also at the work site daily and knew the witness by his first name (Jt.App. 66). The witness also took directions and instructions from Dick Schriber (Jt.App. 67-68) and John Holland (Jt.App. 63-64) and other Southern Pacific personnel (Jt.App. 71). Mr. Oosterbaan also performed the duties as outlined in the instructional booklet set forth above of placing and removing the flags on the tri-level railroad cars for the purposes of signaling engines (Jt.App. 83-84) and followed directions from switchmen regarding the placement of these flags (Jt.App. 83-84). Mr. Oosterbaan also had occasion to receive a free railroad pass from Southern Pacific (Jt.App. 69-70).

Mr. John Grimaddo, another crew member also took directions and instructions from Mr. Jarvis, Hedland, Holland, Morse, and other Southern Pacific supervisors because if he did not, his job was jeopardized (Jt.App. 56-57; 49-50). Mr. Grimaddo was a member of the Southern Pacific Credit Union and borrowed money from that organization as a benefit of his employment (Jt.App. 50). He also had a permanent free railroad pass (Jt.App. 44).

The petitioner, Eugene C. Kelley, said it was customary to see Southern Pacific personnel at the work site (Jt.App. 133-134). Instructions were taken from Dick Schriber often (Jt.App. 133) and other Southern Pacific personnel and if you did not, you got in "trouble" (Jt.App. 134). He also took instructions from switchmen regarding flagging of the tri-level railroad cars which he was working on (Jt.App. 135-

136). He also borrowed money from the Southern Pacific Credit Union (Jt.App. 134) and had obtained a free railroad pass (Jt.App. 134).

There were also examples of instructional correspondence and directives between officers of Pacific Motor Trucking Company and Southern Pacific Company specifically setting forth instructions regarding the operation and unloading of tri-level railroad cars and safety procedures regarding the raising of the safety railings (see petitioner's exhibits 11, 12, 13, and 16).

Mr. Clayton Calkins testified. He was Manager of Safety and Personnel, for Pacific Motor Trucking Company (Jt.App. 90-91). When he was subpoenaed, he immediately contacted the law department of Southern Pacific Company as was his practice (Jt. App. 88) and this department acted as lawyers interchangeably for Pacific Motor Trucking Company and Southern Pacific Company (Jt.App. 88-89). Mr. Calkins testified regarding the directions he received from the head of the safety department of Southern Pacific relative to personnel unloading automobiles:

> ". . . During the period when tri-level and bi-level operations and piggy back generally was starting there was a great deal of direct relationship between Southern Pacific and PMT for mechanical reasons, for experimental reasons, and for instructional reasons" (Jt.App. 105-106).

Mr. Calkins was aware that Mr. Elwood Jarvis, the supervisor of Damage Prevention and Loading Service, took the instructional booklet, which had

been printed and distributed by Southern Pacific for personnel such as petitioner, down to the unloading area and participated with the personnel in instructing them on how to unhook automobiles (Jt.App. 102). Mr. Elwood Jarvis confirmed these facts in his own testimony (Jt.App. 117-118). In addition, Mr. Calkins had a permanent free railroad pass (Jt.App. 89-90).

With regard to the area where the accident in question occurred, Southern Pacific Company owned and controlled the area surrounding the railroad car in question and Pacific Motor Trucking Company did not own nor control any of the area surrounding the railroad car in question (Jt.App. 126). In fact, Pacific Motor Trucking Company owns no property where railroad track is situated (Jt.App. 125-126).

With regard to the equipment that was used in the process of unloading the automobiles in question, Pacific Motor Trucking Company did not own, rent, or lease any equipment used by personnel in the unloading of automobiles from the tri-level railroad cars (Jt. App. 128-129). Appellant, Southern Pacific Company, owned and manufactured the railroad car in question (Jt.App. 126). The ratchets and chains which were being worked with by petitioner when he fell, as well as the safety railing, were part of and affixed to the railroad car (Jt.App. 56, 59, 78).

With regard to additional responsibility for the unloading of the automobiles, there was no contract between Pacific Motor Trucking Company and Southern Pacific Company whereby Pacific Motor Truck-

ing Company was responsible for damage to the automobiles in the unloading process (Jt.App. 127). Southern Pacific Company has never made a claim against Pacific Motor Trucking Company for damage to automobiles incurred during the unloading process (Jt.App. 127-128). Damage incurred in the unloading process is the responsibility of Southern Pacific Company and damage *after* the unloading process and during delivery is the responsibility of Pacific Motor Trucking Company (Jt.App. 115).

The insurance policies which covered Pacific Motor Trucking Company had as their named insured the appellant, Southern Pacific Company (Jt.App. 125).

As far as the unloading of automobiles was concerned, only Pacific Motor Trucking Company was involved in the unloading process; whereas, after the cars were taken off the railroad cars, other companies also delivered automobiles (Jt. App. 99-100). The rate of income received by Pacific Motor Trucking Company was calculated in one manner for the unloading process and an additional different rate was received for the delivery of the automobiles by truck (Jt.App. 98-99).

The rates which Pacific Motor Trucking Company can charge for delivery over highways is set by the I.C.C. (Jt.App. 102-103). Pacific Motor Trucking Company has no license or authority to transport by railroad (Jt.App. 102).

Pacific Motor Trucking Company, from its highest level down to its lowest, took directions and instructions from Southern Pacific Company, its officers and

employees with regard to operation of tri-level railroad cars.

Central Dispatch, which dispatches the PMT trucks, was a Bureau of Southern Pacific Transportation Department and under the *direct supervision* of Mr. J.J. Willis, a Southern Pacific supervisor (Jt.App. 118-120). Whereas, Pacific Motor Trucking Company had a Safety Program and Instructional Program for its 4,000 drivers, it did not have *any* Safety Program or instructional program for the individuals involved in the unloading of automobiles from the tri-level auto carriers (Jt.App. 103-105).[5]

At the time of the accident, Pacific Motor Trucking Company was a wholly owned subsidiary of appellant, Southern Pacific Company, and had been so wholly owned since 1937 (Jt.App. 2). Three out of the four directors at Pacific Motor Trucking Company were Southern Pacific Company vice-presidents (Jt.App. 1). In 1963, the year of the accident, all five directors of Pacific Motor Trucking Company were officers of Southern Pacific Company (Jt. App. 1).

Operating expenses of Pacific Motor Trucking Company were paid from time to time by appellant, Southern Pacific Company (Jt.App. 2).

At the time of the accident in question, Pacific Motor Trucking Company had contracts, for unloading automobiles, only with Southern Pacific Company (Jt.App. 126-127).

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[5]PMT Safety Dept. has never given any instructions to the personnel unloading autos (Jr.App. 105, 83).

At the time of this accident, Southern Pacific Company had contracts for the unloading of automobiles *only* with Pacific Motor Trucking Company (Jt.App. 127).

VI

THE DISTRICT COURT'S DECISION

Prior to the commencement of the trial, a Motion for Summary Judgment was made by Southern Pacific Company seeking to have the District Court determine, as a matter of law, that petitioner did not qualify as an "employee" within the meaning of the F.E.L.A. This Motion was denied (Jt.App. 24).

Thereafter, a pre-trial order was prepared by attorneys for Southern Pacific Company wherein a single issue of *fact* was set for trial. This issue of fact was the "employee" status within the meaning of F.E.L.A. of petitioner (Jt.App. 23).

Prior to rendering its decision in this matter, the District Court specifically elicited from attorneys of both parties their assurance and understanding that the court would act as the jury, as trier of fact, stating:

> "The Court: All right. As long as I have that understanding, I know—that I didn't want to have any confusion on that arise at any time in the course of the proceedings, because the reason I make this observation, in reading the *Baker* case, for instance, the Supreme Court found it to be a question in a sense for the jury."[6]

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[6]For the complete dialogue regarding the understanding of the parties see excerpt attached hereto as Appendix A.

The District Court then found that petitioner, in performing the work he was doing at the time of the accident in question, was, in fact, in such a relationship to Southern Pacific Company as to be covered by the Federal Employers Liability Act (Finding of Fact IX, Jt.App., p. 30).

Findings of Fact were submitted by both parties and no Findings of Fact were submitted to the District Court requesting that petitioner be found to be an employee of Southern Pacific Company.[7]

The District Court, as trier of fact, found that petitioner was an "employee" of Southern Pacific Company for purposes of F.E.L.A. coverage relying on Restatement, Agency 2d, §220; *Baker v. Texas & Pacific Railroad,* 359 U.S. 227 (1959); *Ward v. Atlantic Coast Line,* 362 U.S. 396 (1960); *Smith v. Norfolk & Western Railway Co.,* 407 F.2d 501 (4th Cir. 1969) (see Jt.App., p. 30).

The District Court, in rendering its informal decision from the bench, prior to the formalization of Findings of Fact and Conclusions of Law, while referring to *Baker v. Texas & Pacific Railroad, supra,* stated:

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[7]The Ninth Circuit Court of Appeals, again, unfortunately, apparently relied on a misstatement in appellate briefs by Southern Pacific Company and concluded the District Court "declined to make a finding proposed by the plaintiff that Kelley was an employee of Southern Pacific Company." This conclusion was apparently based on such an assertion in respondent's reply brief at page 2.

A proposed Conclusion of Law was made by petitioner and a similar Conclusion of Law was made by the District Court (Jt. App. 30, 161).

". . . the Court finds some aid and a guide in the language of the Supreme Court in the Baker case wherein the Court stated: 'It has been well said of the question . . .' and the question they are referring to is the question of the use of the terms 'employee' and 'employed' in the Act.

"Now, to repeat: 'It has been well said of the question that each case must be decided on its peculiar facts. And, ordinarily, no one feature of the relationship is determinative.'

"This language, when justifiably considered with some of the language in the decision in the Smith case, and, particularly, the statement 'operational activity aside, we think the nature of the work being done by Baker for the railroad militates toward a finding of agency on standard agency principles.'

"This language and these guides cause the Court to conclude that on the facts presented and the record made in this case, the Court finds that the work being performed by Eugene C. Kelley on July 3, 1963 was in fulfillment of a nondelegable duty of the railroad which brought him within the traditional agency relationship as a matter of fact. . . ." (Jt.App. 152-153).

VII

THE CIRCUIT COURT OF APPEAL'S DECISION

As set forth above, the Court of Appeals erroneously concluded that the work being performed by petitioner at the time of his injury was not part of the fran-

chise of Southern Pacific Company. Rather, the unloading process was optional with a shipper of automobiles. The evidence was uncontradictingly to the contrary (Jt.App. 128- 5-8). Southern Pacific Company admitted in answer to interrogatories prepared by their attorneys that all rates for inbound movement of automobiles on tri-level cars in July of 1963 included the charge for unloading the automobiles (see Jt.App., pp. 128, 5-8).

In addition, the Court of Appeals erroneously concluded that a Finding of Fact was submitted by petitioner suggesting that he was an "employee" of Southern Pacific Company and this Finding of Fact was rejected by the District Court. The Court of Appeals, using this erroneous conclusion, then hypothesized that the District Court must have based its decision on some other theory.

The Court of Appeals, however, failed to comment on the District Court's reliance on Restatement, Agency, 2d, §220. Further, the Court of Appeals failed to mention the decision of *Ward v. Atlantic Coast Line,* 362 U.S. 396 (1960) which was also specifically relied on by the District Court.

The Court of Appeals also failed to even allude to petitioner's sole argument on appeal that determination of "employee" status, within the meaning of the F.E.L.A., is a question of fact.

The Court of Appeals decision simply ignored the entire concept that "employee" status within the meaning of the F.E.L.A. is a question of fact.

Furthermore, the Court of Appeals simply ignored decisions in five other circuits all of which were directly contrary to the Court of Appeals decision.[8]

Rather, the Court of Appeals chose to be "reinforced" by decisions "in this circuit" which have "rejected the contention that employees of a contractor, engaged by a railroad to perform work that is the railroad's responsibility, become railroad employees *ipso facto.*"

This conclusion of the Court of Appeals not only was not supported by a single case which they relied on,[9] but also is directly contrary to the authorities which were relied on by the District Court and which are clearly the law with regard to whether an employee of an independent contractor can be an "employee" of a railroad within the meaning of F.E.L.A.

The Court of Appeals then also implies there is legislative authority to support the proposition that no persons who are employed by an independent con-

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[8]See discussion of decisions of the Third, Fourth, Sixth, Seventh, and Tenth Circuits hereinafter set forth.

[9]The four decisions relied on by the Court of Appeals all involved appellate decisions which affirmed District Court conclusions, in weighing the evidence, regarding "employee" status. As discussed hereinafter, the fundamental error of the Court of Appeals was its failure to recognize "employee" status as being a question of fact and their ignoring the "clearly erroneous" rule of FRCP 52(a). In addition, none of the four decisions pertain to facts where an injury occurred during the performance of work which was part of the franchise of the railroad and for which they had been allowed to charge a tariff. For a more detailed discussion regarding the four decisions, see Appendix B attached hereto.

tractor can, under any circumstances, qualify as a "employee" of a railroad for purposes of F.E.L.A.

Petitioner has at no time claimed he was entitled to F.E.L.A. coverage because he was a member of a class or group. Nor does petitioner claim that the District Court's conclusion justifies the inclusion of a class or group within F.E.L.A. coverage.

On the contrary, petitioner claims that he qualifies for coverage under the F.E.L.A. because of the facts and circumstances surrounding the particular accident that he was involved in.

VIII

FEDERAL RULE OF CIVIL PROCEDURE 52(a) PROHIBITS THE APPELLATE COURT FROM REVERSING THE DISTRICT COURT'S FACTUAL CONCLUSION REGARDING F.E.L.A. "EMPLOYEE" STATUS

Federal Rules of Civil Procedure 52(a) prohibits appellate review of factual questions unless there is a *complete* absence of evidence to support the District Court's findings (*United States v. National Association of Real Estate,* 339 U.S. 485, 494-495; *Dennis v. Denver,* 375 U.S. 208, 210; *Atlantic & Gulf v. Ellerman Lines,* 369 U.S. 355, 359; *Commissioner v. Duberstein,* 363 U.S. 278, 290-291).

Appellate review of questions of fact "must be quite restricted", and findings must stand unless clearly erroneous (*Commissioner v. Duberstein,* 363 U.S. 278, 290-291). This rigidity of appellate review, this court has recognized, is so fundamental that it

is set forth in the Seventh Amendment of the United States Constitution (*Atlantic & Gulf v. Ellerman Lines,* 369 U.S. 355, 359) and is applicable even to the United States Supreme Court in those instances where this Court might give the facts a different construction than was given by the District Court (*United States v. National Association of Real Estate,* 339 U.S. 485, 494-495).

In *Baker v. Texas & Pacific Railroad Co.,* 359 U.S. 227, 228 (1959), this Court stated:

> "The Federal Employers Liability Act does not use the terms 'employee' and 'employed' in any special sense, . . . We think it perfectly plain that the question, like that of fault or of causation under the Act, contains factual elements such as to make it one for the jury under appropriate instructions as to the various relevant factors under law. See Restatement of Agency 2d, §220, comment c; 227, comment a."

In *Ward v. Atlantic Coast Line,* 362 U.S. 820, the injured party was performing work which was the responsibility of an independent contractor and was work being done on a siding privately owned by that independent contractor and used exclusively for the service of that independent contractor. The Supreme Court of the United States, in reversing the Court of Appeals, held that the question of "employee" status of the injured party was a jury question based on Restatement of Agency §220. This Court stated:

> "However, we agree with petitioner's alternative contention that the trial judge erred in refusing to instruct the jury as requested by petitioner,

> . . . as to the factors to be considered by the jury in determining whether the petitioner was an employee of the railroad during the performance of the work within the meaning of the Act. . . . The party's characterization is but one factor to be considered among others, see *Restatement, Agency* 2d §220(2)(i) and the issue is one for determination by the jury on the basis of all relevant factors. *Baker v. Texas & P.R. Co.*, 359 U.S. 227, 3 L.Ed. 2d 756, 79 S. Ct. 664, *supra.* Reversed."[10]

Restatement, Agency 2d, §220 provides:

> "A servant is a person employed to perform services *in the affairs of another,* and who with respect to the physical conduct, and the performance of the services is subject to the other's control or *right* to control." (Emphasis added).

Restatement, Agency 2d, §2 provides:

> "(2) A *servant is an agent* employed by a master to perform service in his affairs whose physical conduct in the performance of the service is controlled or is subject to the right to control by the master." (Emphasis added).

As set forth above, the District Court clearly and explicitly relied on the precise test and standard set

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[10]This Court in *Ward v. Atlantic Coast Line, supra,* rejected petitioner's other contention that he was entitled to recover as a matter of law because the independent contractor was the "agent" of the railroad within the meaning of Section 1 of the F.E.L.A. This contention was rejected because the independent contractor was not performing operational activities required to carry out the franchise of the railroad. The opposite is true in the case at bar. The evidence and findings clearly substantiate that the work being performed by petitioner was in fact required to carry out the franchise of Southern Pacific Company.

forth by the United States Supreme Court in *Baker v. Texas & Pacific Railroad Co., supra; Ward v. Atlantic Coast Line, supra;* and *Restatement of Agency* §220.

The Court of Appeals simply ignored the fact that the District Court had reached a factual conclusion. Rather the Court of Appeals chose to conclude that the District Court had reached a legal conclusion and that this legal conclusion was erroneous. The District Court correctly determined that "employee" status within the meaning of the F.E.L.A. was a factual question.

Because the Court of Appeals misunderstood the issue, they did not attempt to comply with *Federal Rule of Civil Procedure* 52(a) by commenting on the lack of evidence to support the District Court's factual conclusion.

An analysis of the District Court's factual conclusions in comparison to the indicia of *Restatement* §220 shows a definite and specific correlation.[11] The District Court concluded that the responsibility for *immediate* supervision and control of the unloading operations was that of Southern Pacific Company (Jt. App. 29, 30; *Restatement of Agency* 2d, §220(2)(a)). Petitioner was not employed in any type of distinct business or occupation but rather had been employed unloading automobiles for Southern Pacific Company at the same location on a full time basis for a period of eight years and was paid on an hourly

[11]Compare *Restatement*, Agency 2d, §220, comment h.

basis (Jt.App. 28-29; *Restatement of Agency* 2d, §220(2)(b), (d), (f), (g)). The work of unloading the automobiles was part of the regular business of Southern Pacific Company (Jt.App. 30; *Restatement of Agency* 2d, §220(2)(h)). That Southern Pacific Company supplied the instrumentalities, tools, and the place of work for petitioner (Jt.App. 29; *Restatement of Agency* 2d, §220(e)).

This manner of setting forth the Findings of Fact and then specifically citing *Restatement of Agency* 2d §220 can hardly be coincidental particularly when viewed with the fact that petitioner's closing brief, in the District Court, made a specific analysis of comparing the evidence to the *Restatement of Agency* §220. (Cl.Tr. 319-324).*

Notwithstanding this rather clear attempt by the District Court to support the test as dictated by the *Restatement of Agency* 2d, §220, the Court of Appeals concluded the District Court was "not persuaded by the evidence that Kelley was a servant or employee of Southern Pacific in common law conception." Of interest, is the fact that *Restatement, Agency* 2d, §220 is captioned "Who Is a Servant . . . Definition of Servant."

The work being performed by petitioner was of such a nature that respondent, Southern Pacific Company, could not delegate that work as a matter of law. Southern Pacific's franchise responsibilities would necessarily have to be carried out by their "em-

*Cl. Tr. refers to Clerk's Transcript filed with 9th Cir.

ployees." To conclude otherwise would be to conclude that Southern Pacific Company had the power, as well as authority, to delegate portions of their franchise at their whim and at their unbridled discretion.

It was this one aspect alone, of the factors listed in *Restatement of Agency* 2d, §220, which the United States Supreme Court in *Ward v. Atlantic Coast Line, supra,* felt most compelling,[12] as did the 4th circuit in *Smith v. Norfolk & W. Ry., infra.*

IX

REVIEW OF DECISIONS IN OTHER CIRCUITS

The Court of Appeals decision, in the case at bar, is directly contrary to decisions rendered in the Third, Fourth, Sixth, Seventh, and Tenth Circuits. All of these Circuits relied on the very same authorities that were relied on by the District Court in the case at bar.

The Court of Appeals recognized that the *Smith v. Norfolk & W. Ry.,* 4th Cir. 1969, 407 F.2d 501, is factually identical to the case at bar.

The Court of Appeals ignored that certiorari was denied in *Smith v. Norfolk & W. Ry., supra,* (395 U.S. 969, 89 S.Ct. 2134).

Smith v. Norfolk & W. Ry., involved an appeal by the Railroad from a denial of the railroad Motion for Summary Judgment on the question of "employee" status.

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[12]See footnote 10.

The Court of Appeals considered the question of whether or not the existence of an agency relationship between the railroad and the independent contractor would support the applicability of F.E.L.A. coverage to an employee of the independent contractor. This same consideration was given by the Supreme Court of the United States in *Ward v. Atlantic Coast Line, supra.*[13]

However, the Court of Appeals concluded there was no need to decide the correctness of such a theory. The Court stated:

> "We need not decide whether the *Sinkler* doctrine of 'operational activity' properly extends to protect one who is not directly employed by the railroad. See *Hetman v. Fruit Growers Express Co.*, 346 F.2d 947 (3rd Cir. 1965). It is enough here that under traditional agency tests, the decision of the district court that the undisputed facts establish agency does not appear erroneous. In support of that conclusion we need supplement the opinion of the district court only briefly.
>
> "One of the standard tests of agency is 'whether or not the work is part of the regular business of the employer'. Restatement (Second) of Agency §220(h) (1957)."

Of particular interest, *Smith v. Norfolk & W. Ry.* involves facts which are identical to those of the case at bar. In *Smith v. Norfolk & W. Ry. Co.*, the injured party fell while in the process of releasing the restraining chains on an automobile situated on the top level of a tri-level automobile carrier. In con-

[13]See footnote 10.

cluding that the facts surrounding that particular accident met the common law test of "employee" status as defined by the *Restatement, Agency* 2d, §220, the Court of Appeals, as did the District Court in the case at bar, emphasized that one of the tests set forth in the *Restatement, Agency* 2d, §220 is whether the injured party was performing activities that were the regular business of the claimed employer. The Court of Appeals, as did the District Court in the case at bar, felt this fact could hardly be disputed considering that the work being performed was part of the tariff responsibility of the railroad to unload the automobile.

In *Missouri-Kansas-Texas Ry. Co. v. Hearson,* 10th Cir. 1970, 422 F.2d 1037, the Court of Appeals also affirmed the District Court's conclusion that the injured party was an "employee" within the meaning of the F.E.L.A. notwithstanding the fact that he was ostensibly employed by an independent car cleaning contractor.

The Court of Appeals recognized that there was some conflict in the evidence as to whether the common law test of "employee" status, as defined by *Restatement, Agency* 2d, §220. The Court of Appeals, however, went on to agree with the District Court's conclusion that the injured party was an "employee" within the meaning of the F.E.L.A. because the railroad retained the "right of control." Contrary to the Court of Appeals, in the case at bar, the Tenth Circuit recognized there was no conflict in the decisions of any of the Circuits including that of the

Ninth Circuit . t forth in *Dougall v. Spokane, P. & S. Ry.*, (9th Cir., 1953) 207 F.2d 843 and the Fourth Circuit in *Smith v. Norfolk & W. Ry. Co., supra.*

In *Bryne v. Pennsylvania R. Co.* (C.A. 3rd Cir.) 262 F.2d 906, cert. den. 359 U.S. 960, the injured party was an employee of Westinghouse Electric Corporation. He died while working on a locomotive purchased by the Pennsylvania Railroad Company.

The Sixth Circuit, in three separate decisions has supported the District Court's conclusions that an injured employee of an independent contractor which had contracted to unload railroad cars of defendant met the common law test of "employee" status for purposes of F.E.L.A. (see *Cimorelli v. New York Central R. Co.*, 148 F.2d 575; *Pennsylvania R. Co. v. Roth*, 163 F.2d 161; *Pennsylvania R. Co. v. Baralian*, 172 F.2d 710). This Court has cited with approval, on two different occasions, the opinion of *Cimorelli v. New York Central R. Co., supra,* (see *Ward v. Atlantic Coast Line*, 362 U.S. 396, 400; *Baker v. Texas & Pacific Ry. Co., supra*).

In *Schroeder v. Pennsylvania R. Co.*, 397 F.2d 452, the Seventh Circuit also recognized the appropriateness of a District Court's factual conclusion that the common law test of "employee" status provided F.E.L.A. coverage to a decedent killed while unhooking a truck.

The above decisions, with the exception of *Smith v. Norfolk & W. Ry. Co.*, are not factually identical to the case at bar but are in accord with the proposition

that the question of "employee" status is a factual question not to be disturbed on appellate review unless clearly erroneous.

X

COURT OF APPEALS DECISION AS IT WILL AFFECT CASES UNDER THE JONES ACT

There no longer exists any question that decisions rendered under the F.E.L.A., 45 U.S.C. §51 et seq. are applicable and controlling to injuries suffered by seamen under the Jones Act, 46 U.S.C. §688 (*Mitchell v. Trawler Racer,* 362 U.S. 539, 4 L.Ed. 941, 80 S.Ct. 926; *Bell v. Tug Shrike,* 332 F.2d 330, cert. den. 379 U.S. 844, 13 L.Ed.2d 49, 85 S.Ct. 84).

The Court of Appeals decision, in the case at bar, not only is contrary to the authorities previously set forth, but also is irreconcilable with this Court's decision in *Seas Shipping v. Sieracki* (1946) 328 U.S. 85, 90 L.Ed. 1099, 66 S.Ct. 872. *Seas Shipping v. Sieracki, supra,* involved a stevedore who sued a ship owner for injuries sustained on board the ship. The question presented was whether the doctrine of the seaworthiness obligation of the owner extended to an employee of an independent contractor. This Court stated:

> "All the considerations which gave birth to the liability and have shaped its absolute character dictate that the owner should not be free to nullify it by parcelling out his operations to intermediary employers whose sole business is to take over portions of the ship's work or by other de-

vices which would strip the men performing its service of their historic protection.

"It seems, therefore, that when a man is performing a function essential to maritime service on board a ship the fortuitous circumstances of his employment by the shipowner or a stevedoring contractor should not determine the measure of his rights. This is the very basis on which The Jones Act was held applicable to give redress to an injured stevedore in *International Stevedoring Co. v. Haverty,* 149 F.2d 98, 101.

". . . he [the owner] is at liberty to conduct his business by securing the advantages of specialization in labor and skill brought about by model divisions of labor. He is not at liberty by doing this to discard his traditional responsibilities. . . . To allow this would be in substantial effect, to convert the ancient liability for maritime tort into a purely contractual responsibility. *This we are not free to do.*" (emphasis added).

XI

CONCLUSION

The reversal of the Court of Appeals in the case at bar will restore conformity and unanimity to the Circuits. Reversal of the Court of Appeals will also reiterate the importance of restricting appellate review, emphasizing the fundamental value of the trier of fact's unique perspective of evaluating witnesses and presentation of evidence. Reversal of the Court of Appeals will further re-establish this Court's recognition that the Federal Employers Liability Act is

remedial and humanitarian legislation and must be construed liberally (*Urie v. Thompson*, 337 U.S. 163, 182, 69 S.Ct. 1018, 93 L.Ed. 1282 (1949)).

Dated, San Francisco, California,
June 14, 1974.

R. J. ENGEL,
LAW OFFICE
ENGEL & WARNER,
A PROFESSIONAL CORPORATION,
Attorneys for Petitioner.

(Appendices Follow)

Appendix A

Thursday, April 16, 1970

The Clerk: Civil Case No. 45344, Kelley v. Southern Pacific Company, further trial.

The Court: All right, gentlemen.

Mr. Engel: Your Honor, this morning I filed the—as long as I had to go ahead and prepare an argument——

The Court: I have read your memo, and I would like to ask you gentlemen a question at the very outset here.

This matter is before me at the present time for a limited purpose, I am correct in that, without saying what it is, for the moment.

Mr. Engel: Yes, Your Honor.

The Court: Did you have a request for a jury trial here?

Mr. Engel: Yes, Your Honor.

The Court: So that presumably if a ruling were in favor of the plaintiffs eventually you would have a jury trial. It it's against the plaintiff, that presumably will end the case.

Mr. Engel: Correct, Your Honor.

The Court: All right. Now, in determining the relationship of Mr. Eugene C. Kelley to the Southern Pacific Company, are you gentlemen in agreement as to whether this is or is not a question for decision by the Court, or are there circumstances under which this may become a question for decision by the jury?

Mr. Corrigan: Well, I believe the pretrial order provides, and we have so agreed in our pretrial statements, that this is a decision for the Court.

The Court: So that to the degree that any facts are involved in rendering that decision, I become the trier of the facts for that purpose?

Mr. Corrigan: Yes, sir.

Mr. Engel: Correct, Your Honor.

The Court: All right.

Mr. Engel: In other words, it was my understanding——

The Court: All right. As long as I have that understanding, I know—that I didn't want to have any confusion on that arise at any time in the course of the proceedings, because the reason I make this observation, in reading the Baker case, for instance, the Supreme Court found it to be a question in a sense for the jury.

Mr. Engel: Well, Your Honor, what we did here is that we bifurcated the trial in fact, and we asked for—there were two factual problems, the one being presented to the Court now, and the other one would be negligence and damages in a subsequent trial.

For this factual question it was agreed that you would be the trier of fact.

The Court: As long as I understand that there is no possible misunderstanding.

Appendix B

The following is a brief summary of the four decisions relied on by the Ninth Circuit Court of Appeal in the case at bar to support their proposition that employees of an independent contractor engaged in work which is the responsibility of the railroad are not covered by F.E.L.A.:

Norman v. Spokane, P.&S. Ry., D. Ore. 1950, 101 F. Supp. 350, aff'd 192 F.2d 1020, cert. den. 342 U.S. 945 (1950): This opinion appeared nine years before the Supreme Court of the United States' decision in *Baker v. Texas & Pac. Ry.,* 359 U.S. 227. It involved an individual working for a bridge repair company who fell from a scaffolding while working on a bridge. The injured party claimed that the railroad had a nondelegable duty.

However, pursuant to stipulation of the parties, the court specifically did not consider whether the injured party met the common law test of "employee." Furthermore, the work being performed by the injured party was not part of the railroad's franchise nor was it part of the tariff responsibility of the railroad.

Dougall v. Spokane, P. & S. Ry., 9th Cir., 1953, 207 F.2d 843: This opinion relying on *Norman v. Spokane, supra,* was also decided before the Supreme Court of the United States decision in *Baker v. Texas & Pac. Ry., supra.* The Appellate Court affirmed the District Court's findings that the injured party working on a roadway was not entitled to F.E.L.A. coverage. The work being performed was not a part of the franchise of the railroad nor was it activity for which the railroad had tariff responsibility.

Tarboro v. Reading Co., 3rd Cir., 1968, 396 F.2d 941, cert. den. 393 U.S. 1027: The Court of Appeals affirmed the District Court findings. The injured party, employed by a freight forwarder, was unloading coal. The railroad did not have the right nor did they in fact particip te in the directions of the injured party, nor control the premises where the work was being performed.

Turpin v. Chicago, B. & O. Ry., Mo. 1966, 403 S.W. 2d 233, cert. den. 384 U.S. 1003: The Appellate Court affirmed the District Court's findings that the evidence did not support the conclusion that the injured party qualified as a "employee" within the meaning of F.E.L.A. The accident in question occurred on the independent contractor's property, there was no railroad supervision, and no evidence of actual or right to control the work being performed by the injured party.

Each of the aforesaid decisions involved a Court of Appeals affirming a District Court's weighing of the evidence and refusing to reverse the District Court's factual conclusion.

These four decisions are the very antithesis of the Court of Appeals conclusions in the case at bar which reversed the District Court's factual conclusion that the test of "employee" status had factually been met by petitioner.

The Court of Appeals decision in the case at bar is an anomaly in that it is the first appellate decision which reverses a District Court's factual conclusion that "employee" status is supported by the evidence.

Appendix C

"The Witness: I can't answer that."

Now, Page 76, Lines 6 through 16. Okay?

"Q. Which one of you fellows would have had the job to put up the safety rails?

"A. Any one of us.

"Q. Now, you said that Pinkston could have called someone else and had it done, is that right?

"A. Yes.

"Q. Who would he have called?

"A. Any of the other drivers that work on the piggyback.

"Q. What drivers, P.M.T. drivers?

"A. Their names?

"Q. P.M.T. drivers?

"A. Yes."

Now, Page 77, Line 16 through Page 78, Line 23:

"Q. Now, were there any other men around there to give you orders on how to do this job other than Pinkston?

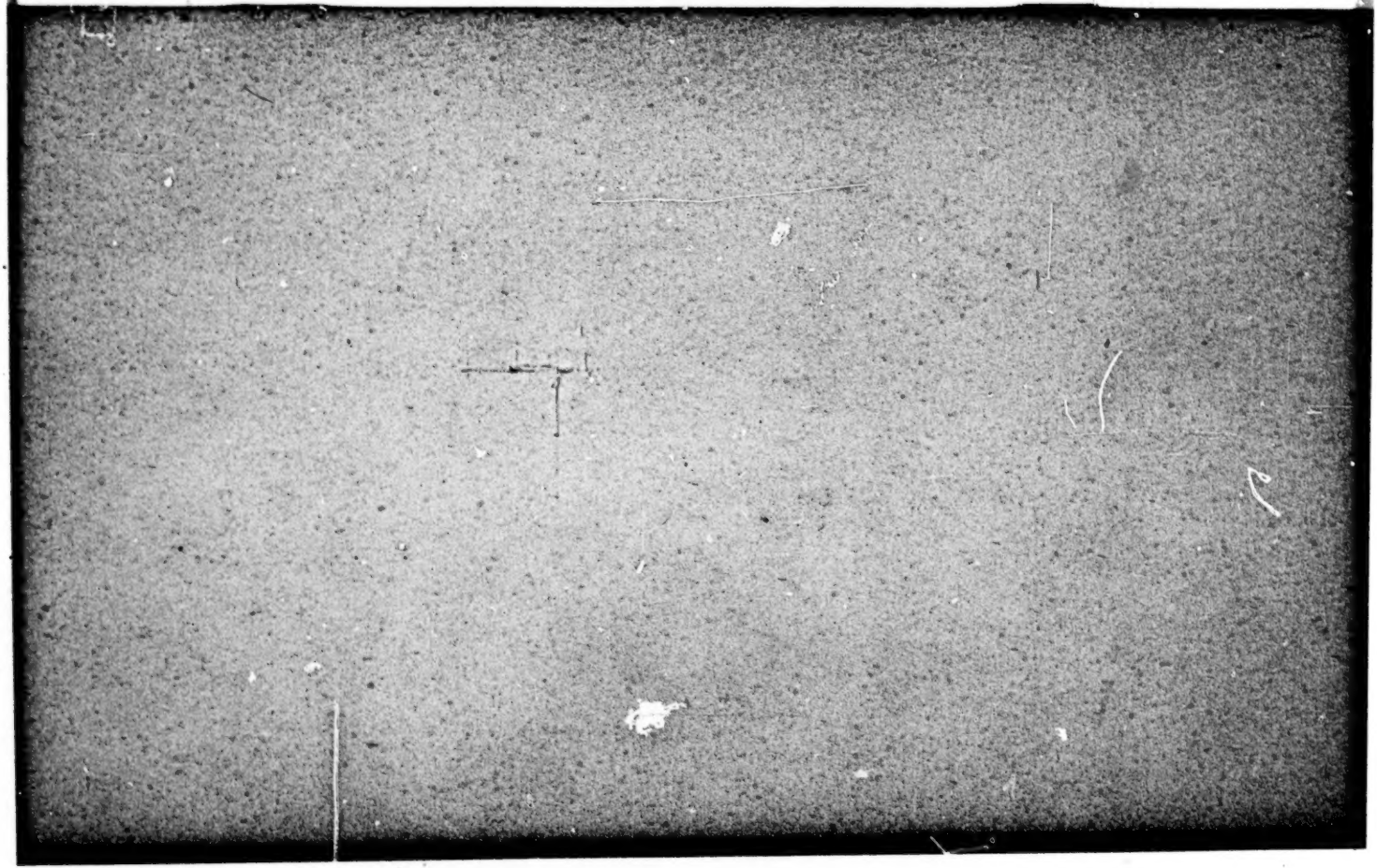
"Mr. Engel: This is on the—this is at the time of the accident?

"Mr. Corrigan: At the time of the accident.

"A. Dutch Hauff was there.

"Q. Who was Dutch Hauff? H-a-u--f-f?

"A. I guess—no.



SUPREME COURT, U. S.

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In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1270

EUGENE C. KELLEY,
Petitioner,

vs.

SOUTHERN PACIFIC COMPANY, a corporation,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Brief for Respondent

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July 26, 1974

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In the Supreme Court of the United States

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Brief for Respondent

OPINION BELOW

The opinion of the Court of Appeals for the Ninth Circuit is reported at 486 F.2d 1084 (9th Cir., 1973), Appendix p. 32.

The order of the Court of Appeals denying the petition for rehearing and rejecting the suggestion for rehearing in banc is printed in the Appendix at p. 39.

The Findings of Fact and Conclusions of Law of the district court are printed at Appendix p. 28 and the Judgment at p. 31. The Findings were not published in Federal Supplement or elsewhere.

JURISDICTION

The Judgment of the Court of Appeals was entered September 7, 1973. A timely petition for rehearing with suggestion for rehearing in banc was denied and rejected November 21, 1973, no judge having requested a vote on the suggestion for rehearing in banc. (App. 39)

Petition for certiorari was docketed February 16, 1974, and granted April 15, 1974.

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Shall the scope of the plaintiff-class of the F.E.L.A. be enlarged to include the employees of *agents* of common carrier railroads.

STATUTE INVOLVED

The text set forth in the brief of petitioner is not complete as material here. The pertinent provision of the Federal Employers' Liability Act, 35 Stat. 65, 45 U.S.C. § 51 (hereafter "F.E.L.A." or "the Act") is as follows (emphasis ours):

> "51. Every common carrier by railroad while engaging in commerce between any of the several States . . . shall be liable in damages to any person suffering injury *while he is employed* by such carrier in such commerce, or, in case of the death of such employe, to his or her personal representative, . . . for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier . . ."

STATEMENT

This is a suit for personal injuries, purportedly brought under the F.E.L.A. The accident on which it is based occurred on July 3, 1963. The complaint was filed June 30,

1966. It alleges: a) that plaintiff was employed by defendant, or, alternatively, b) that plaintiff's true employer, Pacific Motor Trucking Co., was the alter ego of defendant. (Clerk's Record in district court, p. 1)

At pre-trial the case was bifurcated, with trial of the employment and alter-ego issues to proceed before a judge sitting without jury, and trial of the remaining issues (negligence, damages, etc.) to be held later if necessary. (App. 23,[1] Clerk's Record in district court, p. 263)

Following pre-trial, defendant moved for summary judgment. (App. 11) Plaintiff could not substantiate the alter-ego allegations, and they were abandoned. (App. 25 and 26) The motion was denied as to the employment question. (App. 24)

Trial of the employment issue commenced before The Hon. Alfonso J. Zirpoli on April 6, 1970. Following six days of testimony and argument, and submission of the cause, the court announced the intention to rule for plaintiff. (App. 149, 152) Thereafter, plaintiff submitted Proposed Findings of Fact and Conclusions of Law. (App. 161) A hearing was held in chambers at which time the court settled the Findings.

The facts found by the district court (App. 28) are adequate for these proceedings. Some of the basic terminology is as follows: "piggyback" refers to carrying truck trailers or vans on specially equipped railroad flatcars. "Multilevel" refers to the carriage of automobiles on specially constructed railroad cars having either two or three levels or decks (bi-level or tri-level cars) equipped with chains and ratchet devices to "tie down" the automobiles. "Ramping services" refers to the loading or unloading of vans or automobiles on the rail cars. In the case of piggyback, it is

1. Please see note on the Appendix at the end of this brief.

done with a "tractor," i.e., a truck, equipped with a hydraulically raised and lowered "fifth wheel," i.e., the part which connects the tractor to the trailer. (App. 54, 96, 138) In the case of multilevel, the automobiles are physically driven off the various decks of the rail car to ramps, thence to the ground. (App. 76) Before this can be done, a number of steps are necessary (App. 76) including loosening and unhooking the tie-down chains. It was during this procedure the plaintiff was injured. The district court found: (App. 28)

> I. Plaintiff, Eugene C. Kelley, was injured July 3, 1963, at the multi-level railroad car loading and unloading ramp of defendant, Southern Pacific Company, at 4th and Channel Streets, San Francisco, California. At such time and place, plaintiff, along with three other persons, was unchaining new automobiles for unloading when he fell from the third level of a tri-level railroad car.

Since neither party is contesting the sufficiency of the evidence, further elaborate discussion of the findings is not needed. We would, however, like to emphasize the following points which underlie certain of the Findings.

In regard to plaintiff's employment with Pacific Motor Trucking Co., hereafter referred to as PMT, the plaintiff testified that he knew a company such as PMT existed (App. 138), that his father worked for it since 1938 (App. 138), that he made an application for employment to PMT (App. 137), that he worked for it eight years (App. 131), that he was a member of Teamster Local 85 (App. 139), and that he had never belonged to a railroad craft union (App. 139). Both Kelley (App. 136-137) and his co-employees testified they took orders through the PMT chain of command:

The Court: Who did you consider the boss?

The Witness: Well, I considered my P.M.T. supervisor the boss.

The Court: Mr. Pinkston and Mr. Hauff?

The Witness: Right.

The Court: How about Mr. Hellwig, did you consider him being superior to them?

The Witness: Sure did.

The Court: All right. Well now, of all these people that you name, who would you consider the basic, your basic authority, the man you would obey?

[Objection by counsel for plaintiff, sustained. App. 71-72. Pinkston, Hauff and Hellwig had all been identified as PMT supervisors. For other similar testimony, see App. 57, 85, 140-141 plus seven omitted lines (printed in note at end of this brief).]

In response to the foregoing, the district court made Finding II: (App. 28)

> II. Plaintiff and the three men he was working with at the time of his fall were hired, paid by and could be discharged by Pacific Motor Trucking Company and were in the employment of Pacific Motor Trucking Company.

In regard to Findings IV and V (App. 29), which concern PMT's performance as agent for Southern Pacific in the unloading of autos, the full scope of the evidence was as follows: in 1937 PMT started hauling automobiles in multiple-deck truck trailers (App. 97). PMT developed employees capable of performing the loading and unloading functions (App. 97). PMT is one of the largest auto transporters in the country (App. 97). When tri-level rail services came along in the early or mid sixties (App. 97), Southern Pacific (hereafter sometimes SP) contracted with PMT to perform ramping functions at San Francisco (App. 98); the same PMT employees who unloaded the highway auto

carriers at that terminal were used to unload the tri-levels (App. 97). The California Trucking Association is the bargaining agent for PMT and the entire California trucking industry (App. 13, 93). The C.T.A.'s collective bargaining agreement with the Teamsters contained various "piggyback" clauses governing the performance of piggyback and multilevel ramping services by teamsters (App. 92-96). The evidence indicated that although PMT performed the ramping work at San Francisc, other trucking companies performed it at different locations. (App. 120-121, 14; Reporter's Transcript in district court, typed No. p. 313, stamped No. p. 365) Eugene C. Kelley, himself, testified that since the start of his employment (eight years) he had off and on performed piggyback and multilevel ramping work (App. 131).

Further in regard to Findings IV and V and PMT's status as agent, Pacific Motor Trucking Co., although a wholly owned subsidiary of SP is, in its own right, one of the largest motor common carriers in the West: it holds certificates of public convenience and necessity (App. 14) and is regulated as a common carrier pursuant to Part II of the Interstate Commerce Act (App. 15). It operates over 15,000 route miles (App. 13) in seven western states (App. 91) with four thousand employees (App. 91). It publishes tariffs and conducts business directly with the public (App. 17) with its own personnel and equipment (App. 17). It has assets in excess of $37,000,000 and current assets of nearly $10,000,000 (App. 15). It does not have common officers, interlocking directorates or joint employees with SP (App. 12, 13, 15). It maintains general offices in San Francisco where it performs all managerial services.

In Finding VI (dealing with tools), the court held that the record was "not clear" as to who supplied the hammers and ratchet wrenches used by the PMT personnel. There

was practically uncontradicted testimony that PMT supplied all the tools on the job, namely a ratchet (App. 55, 77), a plastic hammer (App. 55), a special tractor fitted with a hydraulic fifth wheel (App. 54, 96, 138), rain gear, overalls, gloves, and protective clothing (App. 95). Perhaps the court's finding on this subject was because of a confusing answer to an interrogatory (App. 129). At any rate, there certainly was no question, and we acknowledge, that the location (i.e., the real property and tracks) where the accident occurred, and the ramps for unloading, were railroad property.

In regard to Finding VII (dealing with safety inspection), we do not question that it was the work and responsibility of SP mechanical department forces to make inspections on the rail cars and to make repairs where needed. We wish to point out, however, that it was uncontradicted that the work of raising the safety railings belonged to PMT employees: (App. 131, the court examining the plaintiff)

> The Court: Well, somebody raised the railing there?
>
> The Witness: Right.
>
> The Court: On each job. Well, who did that work?
>
> The Witness: Anybody could do it.
>
> The Court: Well, the members of your crew did it? Did you ever see the carmen do it before you started the job?
>
> The Witness: No, I can't say I did.
>
> The Court: So that when you say anyone, you mean anyone, for instance, such as the four of you that were working there on the third of July?
>
> The Witness: Right.

See also Appendix 52, 62.

Finally, on the subject of supervision, and as further basis for Finding VII that, ". . . the exercise thereof was executed by employees of Pacific Motor Trucking Company. . .," the evidence showed that the only SP employees who worked regularly in the area were the car clerk and two car inspectors (App. 78 and 79, 141). These persons were 400 feet away and one block away at the time of the accident (App. 86, 142). One of them did not come to the scene (App. 142), and the others came only when they saw the ambulance (App. 87). In other words, the evidence disproved any active direction and control by SP personnel. There simply were none of them around (App. 78, 79).

After the accident Kelley retained a prominent firm of plaintiff's personal injury attorneys. Workmen's compensation benefits were already being supplied by PMT (App. 10). The attorneys obtained an award from the California Workmen's Compensation Appeals Board (App. 9). The common law action against this defendant apparently was overlooked. The period of limitations for such an action was one year and ran without suit being filed. Three days before the expiration of the F.E.L.A. three-year period (45 U.S.C. § 56), this action was instituted.

At trial of the employment issue, the district court found for plaintiff on the twin bases that the work of unloading was a non-delegable activity of the railroad, and that the plaintiff was the employee of an agent of the railroad.

Thereafter the parties at a later hearing stipulated in open court as to remaining issues (including damages) and judgment was granted and entered. (App. 31)

The Court of Appeals, squarely confronting a conflict with the Fourth Circuit, held that the relationship of agency to a railroad was not sufficient to place one within the plaintiff class of the F.E.L.A., and reversed. (App. 32)

SUMMARY OF ARGUMENT

The plaintiff was an employee of a trucking company, injured while unloading new automobiles from a railroad tri-level car situated on railroad property. Plaintiff sued defendant under the F.E.L.A. alleging i) that he was the employee of defendant, and ii) that his true employer, the trucking company, was the alter ego of defendant. The alter-ego theory was abandoned. The district court held for plaintiff on the ground plaintiff was an *employee of an agent* of defendant, citing *Smith v. Norfolk & Western R.*, 407 F.2d 501 (4th Cir., 1969), cert. den. 395 U.S. 969. The Ninth Circuit reversed (486 F.2d 1084 (9th Cir., 1973)) on the ground the F.E.L.A. is applicable only where a common law master-servant relationship exists, citing *Baker v. Texas & P. R.*, 359 U.S. 227 (1959).

The F.E.L.A. establishes three classes: the plaintiff class, consisting of employees and personal representatives; the defendant class, consisting of common carrier railroads; and a class of persons for whose acts the carriers are made liable, consisting of officers, agents and employees.

By a plain reading of the statute, non-servant agents are not included in the plaintiff class. Also, since "agents" are mentioned in another class, they are excluded from the plaintiff class by operation of *expressio unis est exclusio alterius*.

In the 1939 amendments to the F.E.L.A. Congress declined to extend the Act to several peripheral industries. This, however, is exactly petitioner's situation—he is an employee of a peripheral industry. In addition rail industry social insurance and labor relations legislation passed in the decade of the 1930's excludes carrier affiliated trucking service, thus exhibiting the same pattern of separate legislative treatment for this particular peripheral industry.

This Court has a settled line of judicial construction in which the plaintiff class is confined to employees, starting with *Robinson v. Baltimore & O. R.*, 237 U.S. 84 (1915), and extending through *Baker v. Texas & P. R.*, 359 U.S. 227 (1959).

Nor do cases from other courts support the *Smith* formulation. Instead they recognize that one becomes a member of the plaintiff class by three means: i) by being a true employee—not present here, ii) by being a borrowed servant—rejected by the district court here, iii) by being an employee of an alter ego of a railroad—specifically abandoned by plaintiff here.

The *Smith* case is erroneous in that it:

i) takes alter ego language from other cases ("employee of an agent or adjunct") and transforms it into an agency concept,

ii) talks about agency when the authorities to which it refers are dealing with employment.

iii) cites cases which do not even discuss, let alone support, its central premise that employees of agents belong in the plaintiff class, and

iv) ignores the plain wording of the Act and settled judicial construction of this Court.

The district court, while specifically finding plaintiff an employee of the trucking company, rejected a proposed Conclusion of Law stating plaintiff was an employee of defendant, and did not find defendant to be in any relationship other than that the trucking company was its agent.

The concepts of non-delegable work and "operational activity" operate only to make sure the carrier does not escape liability to those in the plaintiff class, and do not operate to create employment where none exists. Likewise, there is no need to construe this work-injury statute for purposes of preventing the contracting out of work. Collec-

tive bargaining laws and arrangements are the proper devices to control that.

Rail tariffs are required to cover all accessorial services in connection with the transportation of property by railroad. This does not mean these services are necessarily performed by railroad employees. To so construe the Act would result in extending it to significant new groups of workers.

Expansion of the F.E.L.A. to new groups runs counter to the accepted norm for the adjustment of work-connected injury. It would result in extending and perpetuating a cruel, outmoded and wasteful system. It would inevitably hinder the operation of concurrent workmen's compensation.

ARGUMENT

I. The Operations of the Rail Industry Are Closely Interrelated With Those of Many Other Industries.

The basic framework of this case has to do with the scope of the plaintiff class of the F.E.L.A. As will be argued in a moment, the Act confines the plaintiff class to employees of common carrier railroads. The plaintiff here, however, was an employee of a trucking company. He was injured while working on a railroad car, situated on railroad property.

The operations of the rail industry are closely interrelated with those of many other industries—shippers, consignees, suppliers, other railroads, those performing services on its premises, those working on or about railroad cars—and a host of terminal and accessorial functions —icing, weighing, storage, loading and unloading, receipt, delivery, elevation, transfer in transit, refrigeration, etc.

This Court has noted, ". . . there exist a number of activities and facilities which, while used in conjunction with

railroads and closely related to railroading, are yet not railroading itself." *Edwards v. Pacific Express Co.*, 390 U.S. 538 at 540 (1968).

An often litigated question is whether the employees of such firms, when injured, are eligible for a Federal Employers' Liability Act suit against the common carrier railroad. In fact there are literally hundreds of appellate decisions on the question. See the comprehensive annotation in 30 A.L.R.2d 517 (1953). This case presents that familiar problem in a relatively new technological setting, that of piggyback and multilevel rail service. The factual situation, however, is not the distinguishing feature of this case. Rather, the distinctive aspect, as will be hereafter argued, is a new legal setting—a formulation by the Fourth Circuit in which "agents" and their employees are within the F.E.L.A. plaintiff class. The correctness of that formulation is the basic question posed by this case.

II. The Plain Wording of the F.E.L.A. Requires an Employment Relationship.

The operative part of section 51 has been set forth previously in the section entitled STATUTE INVOLVED. The Act sets up three classes: a plaintiff class consisting of employees and personal representatives of deceased employees; a defendant class consisting of common carrier railroads and trustees thereof; and a class of persons for whose acts the carriers are made liable—officers, agents or employees. As to the plaintiff class the key words are, ". . . while he is employed" by such carrier. The plain wording obviously does not include non-servant agents or the employees of such agents. Moreover, the third class—persons for whose acts the carriers are liable—*does* specifi-

cally include agents. Under regular principles of statutory construction, the use of the word in the one class operates to exclude it from the classes where it is not mentioned—*expressio unis est exclusio alterius*. Thus both from a plain reading and from application of standard principles, the plaintiff class is not broad enough to include agents or their employees.

III. Construction of the Act by This Court Requires an Employment Relationship.

In construing the plaintiff class of the F.E.L.A., this Court has consistently held that the Act requires an employment relationship. The basic case is *Robinson v. Baltimore and Ohio R. Co.*, 237 U.S. 84 (1915). There the plaintiff was a Pullman Company porter. Discussing the applicability of the F.E.L.A., the Court states:

> ". . . The application of this provision depends upon the plaintiff's employment. For the 'liability created' by the Act is a liability to the 'employees' of the carrier, and not to others; . . ." (p. 91)
>
> "We are of the opinion that Congress used the words 'employe' and 'employed' in the statute in their natural sense and intended to describe the conventional relation of employer and employe. It was well known that there were on interstate trains persons engaged in various services for other masters. Congress, familiar with this situation, did not use any appropriate expression which could be taken to indicate a purpose to include such persons among those to whom the railroad company was to be liable under the Act." (p. 94)

Other fundamental cases are *Chicago, R. I. & P. R. v. Bond*, 240 U.S. 449 (1916), *Hull v. Philadelphia & R. R.*, 252 U.S. 475 (1920), and *Linstead v. Chesapeake & O. R.*, 276 U.S. 28 (1928).

In more recent years the Court has held in two *per curiam* opinions that "borrowed servant" is part of the concept of employment. *Baker v. Texas and Pacific R.*, 359 U.S. 227 (1958); *Ward v. Atlantic Coast Line R.*, 362 U.S. 396 (1960). In doing so, however, the Court reiterated the basic rule:

> "The Federal Employers' Liability Act does not use the terms 'employee' and 'employed' in any special sense, *Robinson v. Baltimore & Ohio R. Co.*, 237 U.S. 84, 94, so that the familiar general legal problems as to whose 'employee' or 'servant' a worker is at a given time present themselves as matters of federal law under the Act . . ."
>
> *Baker v. Texas & P. R. Co.*, 359 U.S. 227 at 228 (1958).

There is no authority from this Court that being an agent or an employee of an agent is sufficient to place one within the F.E.L.A. plaintiff class.

IV. The Legislative History Confines the Act to Railroad Employees and Excludes Employees of Peripheral Industries.

In the last paragraph of its opinion, the Court of Appeals observes that the legislative history of the 1939 amendments to the F.E.L.A. precludes treating employees of contractors as if they were employees of the railroad when common law analysis fails to yield that conclusion. The heart of the matter is set forth by the Court of Appeals. The detail of it is as follows.

In the decade of the 1930's, Congress enacted the basic labor relations and social insurance legislation for the rail industry. See the amendments to the Railway Labor Act, 48 Stat. 1185, 45 U.S.C. § 151; the Railroad Retirement Act

of 1937, 50 Stat. 307, 45 U.S.C. § 228a; the Railroad Retirement Tax Act, 50 Stat. 435 (1937), Internal Revenue Code of 1954, 26 U.S.C. § 3231 (a); the Railroad Unemployment Insurance Act, 52 Stat. 1094, 45 U.S.C. § 351 (a).

In each of these acts, Congress included railroad-owned or controlled companies which performed services in connection with the transportation. That is, Congress included rail-owned companies performing accessorial services. But Congress specifically *excluded* from such coverage railroad-owned companies performing "trucking service." See the "(other than trucking service)" exclusion in the sections of the various acts cited above. Congress thus accorded a separate legislative treatment not only to the carrier affiliated peripheral industries (by inclusion) but especially to railroad-owned trucking companies furnishing services in connection with railroad operations (by exclusion).

The reason for this exclusion is simple. The first of the bills to be enacted was the 1934 amendments to the Railway Labor Act. Commissioner Joseph B. Eastman, Federal Coordinator of Transportation, was the draftsman of the 1934 amendments. Their history indicates that Mr. Eastman first intended to include within "carrier" those rail trucking subsidiaries performing terminal delivery services. Because the proposed inclusion of trucking companies in the coverage of the Railway Labor Act was not desired, the bill was thereafter amended by the House Committee by insertion of the specific "(other than trucking service)" exclusion. As thus amended, the Senate committee concurred. The bill was, in that form, enacted by both Houses and signed into law by the President. The legislative histories of the Railroad Retirement Act and the Railroad Unemployment Insurance Act exhibit this same pattern of

exclusion of trucking service.[2] This is the background against which Congress considered the proposed amendments to the F.E.L.A. in 1939—i.e., a decade of recognition and separate legislative treatment of teamster performed terminal services.

In 1939 Congress substantially amended the F.E.L.A., 53 Stat. 1404. One of the proposed amendments was Senate Bill 1708 (76th Cong. 1st Sess., 1939). This bill would have amended Section 1 of the Act to read:

> "Every common carrier by railroad, including every express company, freight-forwarding company, and sleeping-car company, engaged in commerce . . ."

Such a proposal was, of course, in the face of this Court's construction of the Act to exclude employees of sleeping-car companies and express companies (*Robinson v. Baltimore & Ohio R.*, 237 U.S. 84 (1915); *Wells Fargo & Co. v. Taylor*, 254 U.S. 175 (1920).

The same objections were raised to the inclusion of teamster services within the ambit of the F.E.L.A. as had been raised to their inclusion in the railroad labor relations and social insurance legislation! Hearings were held before a sub-committee of the Committee on the Judiciary of the Senate commencing Tuesday, March 28, 1939.

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2. The Railroad Retirement Act of 1934 48 Stat. 1283, carried over the definition of "carrier" from the 1934 amendments to the Railway Labor Act. The Retirement Act was held unconstitutional, *Railroad Retirement Board v. Alton Railroad*, 295 U.S. 330 (1935). Congress then separated the retirement and taxing provisions in an effort to overcome the constitutional objection. Railroad Retirement Act (1935), 49 Stat. 967; Carriers Taxing Act, 49 Stat. 974 (1935). The taxing act was also held unconstitutional, *Alton Railroad v. Railroad Retirement Board*, 16 F. Supp. 955 (D.C. Dist. 1936). Thereafter the present laws, previously cited, were enacted.

The General Counsel of the Brotherhood of Railroad Trainmen testified. In regard to S. 1708 he was asked:

"Senator Burke. You see no objection to it, do you?

The General Counsel (Mr. McGrath) then explained to the senators his reservations:

"Mr. McGrath. I do not, but I have some doubt—and this is my personal opinion—about the wisdom of putting in freight-forwarding companies without some further consideration, because there are many freight-forwarding companies. In some instances there are trucking companies that call themselves freight-forwarding companies, and there are companies which are subsidiaries of railroads that carry on their business in part by truck and in part by rail . . ."

Later, when the representative of Railway Express testified, the following exchange occurred:

Mr. Wilson. I am authorized to speak only for the company, but yesterday a representative of one of the unions told me I might speak for him. * * *

Mr. Wilson. Both Mr. Harrison and *Mr. O'Brien, the latter representing the International Brotherhood of Teamsters,* Chauffeurs and Helpers. Mr. O'Brien stated very definitely that he was very much opposed to the inclusion of express companies . . .

Senator Neely. At whose request were the express companies and the Pullman Co. included in the proposed legislation?

Mr. McGrath. Maybe I can throw a little light on that question.

* * *

The representative of the teamsters was here yesterday. He referred to his affiliation with the American Federation of Labor, and said that he might be opposed to certain features of the bill. In discussion with him later he indicated that they *did not want to have*

the teamsters brought under the act. That is as much information as I can give you on the subject." (Emphasis added) (Hearings on S. 1708—Before the Subcommittee of the Committee on the Judiciary, 76th Cong., 1st Sess., pp. 3, 26, 56, 57 (1939))

The report in the Senate on the bill which ultimately passed states:

> The bill as introduced was intended to broaden the application of the act to include express, freight forwarding and sleeping-car companies. Upon the hearings it was clearly shown that there is neither necessity nor demand for the inclusion of these companies in the act. Therefore, they have been excluded from the substitute. (Senate Committee on the Judiciary, Amending the Employers' Liability Act, S.Rep. No. 661, 76th Cong., 1st Sess.)

The significance of all this is plain. In the decade of the 1930's, Congress not only amended the F.E.L.A. but also enacted major legislation for the railroad industry in the fields of labor relations and social insurance. By that time, trucking company accessorial services for railroads were a long established practice. The legislative history (as well as the plain wording) of these acts unequivocally shows Congressional awareness of this service and intent to exclude it. When it came time to amend the F.E.L.A., Congress likewise declined to extend the Act to new fields of activity —including new fields serviced by the trucking industry.

Furthermore, in considering the legislative history of the F.E.L.A., it is worth noting that the Employers' Liability Act of 1906, 32 Stat. 232, (held unconstitutional in the Employers' Liability Cases, 207 U.S. 463 (1908)) applied to every common carrier—not just railroads. (See p.

497 of the opinion for discussion.) This feature was changed in the 1908 version of the Act. In debate on the floor of the Senate on passage of the 1908 act, one sponsor of the bill explains:

> "The House bill [which was the bill finally enacted] confines its application entirely to the employees of railways engaged in interstate commerce, whereas the act of 1906 was applicable not only to railways, but to all common carriers . . ." Cong. Rec. 4527 (1908) (remarks of Senator Dolliver)

Also, at a later point, another sponsor of the legislation states:

> "I desire that this enactment shall apply to the great army of men who are engaged in operating trains in interstate commerce . . .
>
> At present, Mr. President, I desire to cooperate with my fellow-Senators here in the passage of a bill which relates to railroad employees alone, and I hope that the bill as it came from the House will pass the Senate without being complicated by needless extension to other and less pressing subjects." Cong. Rec. 4539 (1908) (remarks of Senator Carter)

Thus the contrasts between the 1906 and 1908 acts indicate Congress did not intend the new act to extend to the employees of other common carriers, or, indeed to the employees of anyone except the railroads. The purpose of the legislation was to protect the "great army of men who are engaged in operating trains"—not those in affiliated industries whose needs were deemed "less pressing subjects."

V. The Decision in Smith v. Norfolk & Western R. Is Erroneous.

The basis for the district court's ruling in favor of plaintiff is a 1969 decision of the United States Court of Appeals for the Fourth Circuit, *Smith v. Norfolk and Western R.*,

407 F.2d 501 (4th Cir. 1969), cert. den., 395 U.S. 979, a case which is genuinely conflicting with the decision of the Ninth Circuit in this case. The factual setting of *Smith* is exactly parallel to the present case, .i.e., a teamster employee of a trucking company fell from the top level of a tri-level rail car while unchaining automobiles preparatory to unloading them. The trucking company was acting as the agent of the railroad. The court in *Smith* explicitly states that, "In our case the plaintiff was *not* an employee of the railroad . . ." (p. 502, emphasis is the court's).

After reciting the facts, the *Smith* court in the second paragraph articulates the legal premise underlying the entire opinion:

> ". . . if the injured worker is employed by an *agent* . . . of the railroad he will be treated as an employee . . . for the purposes of the Act. [citations omitted] Thus traditional concepts of agency extend the coverage of the Act." (p. 502, emphasis supplied)

The remaining four paragraphs of the opinion are devoted—not to explaining the underlying legal premise—but to reinforcing the district court's finding of *agency*. The decision is erroneous in at least the following respects:

1. It confuses the concepts of employment, independent contractor and agency. For example, the court continually refers to Restatement of Agency 2d § 220 as setting forth the standards for determining *agency*, whereas the true subject of the section is employment.

2. It overlooks the plain language of the statute which confines the plaintiff class to employees. It also overlooks the operation of the principle *expressio unis*, in that "agents" are expressly mentioned in another class.

3. The authorities cited by the *Smith* court do not stand for the proposition for which they are cited—e.g., that an employee of an agent is within the plaintiff class. The *Smith* decision relies on three cases from the Sixth Circuit: *Cimorelli v. New York Cent. R.*, 148 F.2d 575 (6th Cir., 1945); *Pennsylvania R. v. Roth*, 163 F.2d 161 (6th Cir., 1947); and, *Pennsylvania R. v. Barlion*, 172 F.2d 710 (6th Cir., 1949). In each of these cases the court adopts an orthodox analysis of the Act—i.e., it looks for and finds an *employment* relationship. (*Cimorelli*: "[plaintiff] was the employee of appellee." 148 F.2d at 577: *Roth*: "The District Judge . . . instructed the jury as a matter of law that [the plaintiff] was at the time of the accident in the employ of the appellant . . ." 163 F.2d at 163; *Barlion*: ". . . appellee Barlion was subject to the Federal Employers' Liability Act as an employee of the railroad." 172 F.2d at 712.) These cases do not hold that being an employee of a railroad's agent—as opposed to being an employee of the railroad itself—is sufficient to place one within the F.E.L.A. plaintiff class. As contrasted with these cases, the *Smith* court specifically states, ". . . the plaintiff was *not* an employee of the railroad." (p. 502, emphasis is the court's) *Cimorelli*, *Barlion* and *Roth* are, perhaps startling results for a defense oriented lawyer, but nevertheless the rationale is conventional—i.e., *the injured person is found to be an employee of the common carrier railroad.*

4. The *Smith* opinion takes the wording "agent or adjunct" and construes it so that "traditional concepts of agency extend the coverage of the Act." However, the source of that wording is *not* in the law of agency but in the law of alter ego. Cases in which truck company employees sue railroads under the F.E.L.A. illustrate this:

In *Fawcett v. Missouri Pacific R.*, 242 F. Supp. 675 (W.D. La. 1965), afd. *per curiam* 347 F.2d 233 (5th Cir. 1965), cert. den. 382 U.S. 907, the deceased was an employee of Missouri Pacific Truck Lines, a wholly-owned subsidiary of the defendant railroad. He was killed while loading trailers on a flatcar. The plaintiff advanced three possible bases for inclusion in the F.E.L.A. plaintiff class, an analysis which is equally pertinent here:

> i) The worker is hired by the railroad, on its payroll, and under its direction and control.
>
> ii) The worker is hired by someone other than the railroad, but is under its direction and supervision.
>
> iii) The worker is an employee of an "adjunct or agent" of the railroad. (The exact phraseology of the *Smith* opinion.)

The court states, "Admittedly the first two situations are not involved." As material here, however, the court then notes, "There remains the third possibility . . ." (p. 677) The court recognized this as an alter ego theory:

> "As we analyze it, plaintiff's real contention is that because the trucking company is a wholly owned subsidiary of the defendant, it, the trucking company was the alter ego, adjunct, subsidiary agent, and instrumentality of the railroad." (p. 677)

After a careful review of the controlling authorities, the court rejects this contention. Judgment was granted for the defendant. The Fifth Circuit affirmed (347 F.2d 233), finding itself, "in agreement with the opinion, findings and conclusions of the district court." (p. 233)

Turpin v. Chicago, B. & Q. R., 403 S.W. 2d 233 (Missouri, 1966), cert. den. 384 U.S. 1003 was cited and relied upon by the Ninth Circuit in its opinion in this case. The plaintiff was employed by Burlington Truck Lines, a wholly-owned subsidiary of the defendant railroad. He claimed injury while chaining trailers on flatcars. The court considered a number of theories by which the plaintiff could become a member of the F.E.L.A. plaintiff class, including, i) that of railroad control and supervision of plaintiff, ii) that plaintiff was "furthering operational activities" of the railroad, iii) that a subsidiary trucking corporation was an "illegal device" to avoid the F.E.L.A., and iv) that the truck company was the alter ego of the railroad. This comprehensive opinion treats in detail factual contentions remarkably similar to those raised in the present case. It discusses the leading authorities on each legal theory. As pertinent here, the plaintiff contended, "the sole ownership of stock and the presence of railroad officers on the Truck Lines board," proved that the truck company was the mere "agent" of the railroad. The Missouri Supreme Court recognized this as alter ego theory. Citing *Fawcett* and applying recognized federal authorities, it concluded there was no justification for disregarding the separate corporate identities.

In *Brooks v. Southwestern Transportation*, 494 F.2d 1271 (6th Cir. 1974) the Sixth Circuit *cited and relied upon* this case, *Kelley v. Southern Pacific.*[3]

3. Another recent case *citing this case* and *agreeing with the Ninth Circuit* is the Appellate Division, Superior Court of New Jersey, *Pelliccioni v. Schuyler Packing*, —— A.2d —— (Super. Ct. N.J. App. Div., A 2241-72).

The decedent was an employee of a trucking company. Plaintiff's theory was alter ego: The railroad defendant owned all the trucking company stock, had some common officers, advanced money to it, received dividends, etc. The court easily recognizes the separate corporate identities, that the trucking company is not a railroad, and the railroad not the employer. (p. 1272)

The point of the foregoing cases for present purposes is, although the *language* used for these contentions is that of the law of agency, the body of law which is actually sought to be applied is that of alter ego. In the *Smith* case,[4] as here,[5] however, *there is no alter ego issue.* Therefore the *Smith* court was wrong i) to import this concept (alter ego) into the case at all, and ii) to mislabel it as an agency concept.[6]

5. The opinion fails to take note of the legislative history of the 1939 amendments to the F.E.L.A. Essentially that same history and analysis is set forth in

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4. Because Baker-Driveaway Company, the trucking company, was not owned by the defendant railroad and alter ego was not discussed in the opinion.

5. Because *specifically abandoned* by plaintiff in the trial court and here: App. 26, last paragraph; footnote 1, p. 5, petition for writ of certiorari; footnote 3, p. 6, Brief of Petitioner. See opinion in Court of Appeals, App. bottom 34 and top 35.

6. The Court should not gather from *Fawcett, Turpin* and *Brooks* that only railroad-owned truck companies perform ramping services. Cases illustrating F.E.L.A. actions where non-railroad-owned truck firms were involved are: *Waters v. Chicago & E. I. R.*, 86 Ill. App. 48, 229 N.E. 2d 151 (1967) and *Schroeder v. Pennsylvania R.*, 397 F.2d 452 (7th Cir. 1968). In the nature of things, however, the alter ego theory is only likely to appear where the trucking company is owned by the railroad. Of course, this is exactly the type of entity (carrier affiliated companies) which is the subject of the statutory history set forth in section IV of the Argument.

Edwards v. Pacific Fruit Express, 390 U.S. 538 (1968), the last case in which this Court considered the scope of the F.E.L.A. The Fourth Circuit either was not aware of it or chose to ignore it. The Ninth Circuit rightly placed reliance on it.

6. Although it declines to cite it as a precedent, the *Smith* opinion — erroneously — derives support from *Sinkler v. Missouri Pacific R.,* 356 U.S. 326 (1958).

Sinkler is the case in which a cook on a business car was injured through the switching activities of a belt line railroad. The court held the switching was an operational activity for which the railroad was liable. *Sinkler,* however, is a construction, not of the plaintiff class, but of the class of "officers, agents and employees," for whom a railroad is liable. The doctrine enunciated in this case operates to protect one who was concededly an employee of the defendant railroad. The case does not construe the plaintiff class and did not create an employment relationship where none actually existed. The *Smith* court is wrong, therefore, in suggesting, "We need not decide" whether operational activity extends the plaintiff class (p. 502). *Sinkler* simply could not be authority for that proposition.

7. The *Smith* court was wrong to single out and place reliance on only one factor (regular business) from Restatement of Agency 2d § 220's list of ten factors. Especially was it wrong when: a) this Court has stated that no one factor is determinative (*Baker v. Texas & P. Ry.,* 359 U.S. 227 at 228 (1959)), and, b) it completely overlooks the factor which this Court said is "critical" — *immediate control and supervision* (*Shenker v. Baltimore & Ohio R.,* 374 U.S. 1 at 6

(1963)). Thus, even if the *Smith* court was discussing "employment" instead of "agency," it misapplied the criteria for determining employment.

8. The reasoning of the *Smith* court is superficial. The court reasons from tariff liabilities ("the railroad has undertaken a contractual duty") and freight claims liabilities ("Yesterday's cattle may be today's Chryslers") into the field of adjustment of work-connected injuries—a field where the problems to be solved and the policy considerations are vastly different.

For the foregoing reasons the *Smith* decision ought to be disapproved.

VI. The District Court Found an Agency Relationship and Rejected Finding an Employment Relationship.

On page 18 of his brief, petitioner states:

> "The District Court, as trier of fact, found that petitioner was an 'employee' of Southern Pacific Company for purposes of F.E.L.A. coverage . . ."

If that is true, why does not petitioner simply quote the Finding? It is simple enough in regard to PMT:

> "II. Plaintiff and the three men he was working with . . . were in the employment of Pacific Motor Trucking Company." (App. 28)

If petitioner's assertion is true, why not set forth verbatim the appropriate Finding? The answer is obvious: a search of the Findings and Conclusions nowhere discloses any language of employment in regard to Kelley and SP.

What the court *does* find, in three specific places, is that PMT was the *agent* for SP. (Findings IV, V and VIII, App. 29) *No other relationship is mentioned.* It is thus apparent the district court found Kelley to be an employee of PMT, and PMT to be an agent of SP, and nothing more!

As the Ninth Circuit notes:

> "Moreover, after considering the evidence on control and supervision, the court declined to make a finding proposed by the plaintiff that Kelley was an employee of Southern Pacific." (App. 34)

The district court did, indeed, have before it material allegedly showing railroad direction and control. This material was vigorously presented and argued by petitioner. Thereafter petitioner proposed the following Findings of Fact and Conclusion of Law:

> PROPOSED FINDING II: "Defendant Southern Pacific Company . . . had the right to exercise control over the details of the work . . ." (App. 162)
>
> PROPOSED FINDING IX: "Defendant Southern Pacific Company and the plaintiff Eugene C. Kelley believed that a relationship of master and servant existed . . ." (App. 163)
>
> PROPOSED CONCLUSION I: "The plaintiff, Eugene C. Kelley, was an "empoyee" of defendant . . ."[7] (App. 163)

The district court *refused to adopt* any of these proposed statements. Instead the district court adopted findings in which:

i) it placed in SP the "responsibility,"[8] but *not actual*

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7. Petitioner argues this statement was proposed as a Conclusion of Law only, and not as a Finding of Fact. The district court, however, regarded this ultimate fact as *both* a question of fact and a conclusion of law (Finding IX and Conclusion I). Moreover, had the district court adopted petitioner's proposal as a conclusion of law, it would be legally effective also as a finding of fact. See for example, *Solway Metal Sales v. Baltimore & O. R.*, 344 F.2d 568 (D.C. Cir., 1965).

8. The sense in which the district court uses the term "responsibility" in Findings IV and VII is truly enigmatic. The senses in which it is *not* used (actual control or right to control) are indicated above. In addition, the way the term *is* used, there seems

control (found to be in PMT: "the exercise thereof was executed by . . . Pacific Motor Trucking Company,") or the *right to control* (proposed by petitioner but rejected by the court), and

ii) the statement "Kelley, was an 'employee'" (proposed by petitioner) was changed to read, "brought plaintiff within the traditional agency relationship."

Thus in summary the district court *rejected* findings: i) in which the main factor in determining employment—control—was placed in SP, and ii) of the ultimate fact itself—SP employment.

In addition, a second aspect of petitioner's proposed findings deserves mention. It is a negative aspect: at no point does petitioner propose the use of the term "agent." That term, and the findings embodying it, were purely the product of the district court. The adoption of the findings on agency and the rejection of those on "employment" were not inadvertent.

As the Ninth Circuit noted, "[the district] court adopted a special concept of 'employment' for F.E.L.A. purposes that has found favor with the Court of Appeals for the

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to be nothing wrong with a delegation of the responsibility, e.g., in Finding IV, the court states the work was the "responsibility" of SP, "to be performed by it *or through its agents* . . ." (emphasis ours) Furthermore, the term "responsibility" is not necessarily synonomous with "right to." For example, SP has extensive telephone and computer systems. These are installed and serviced by telephone company and IBM personnel. SP obviously has the "responsibility" for seeing that these systems continue to function. Indeed, given the present state of rail technology, the "franchise" could not be operated if they did not. However, in spite of the responsibility, SP does not have on its payroll the technical personnel capable of servicing them. In any case, even if one interpreted Finding VIII as a finding of SP control, this would not amount to a finding of employment. Control would have significance only to show plaintiff was a borrowed servant or in some similar status. But it was exactly petitioner's Proposed Conclusion No. I—which cites two cases (not quoted) dealing with borrowed servant—that the district court rejected.

Fourth Circuit . . ." (App. 35). That the district court did so cannot be doubted. First, in announcing its ruling the court *said so:*

> The Court: All right.
>
> While an understanding of the full scope of the language of the statute, and, in particular, the terms "while he is employed by such carrier" present serious difficulty, . . .
>
> This language when justifiably considered with some of the language in the decision in the Smith case, and, particularly, the statement 'operational activity aside, we think the nature of the work being done by Baker for the railroad militates toward a finding of agency on standard agency principles.
>
> This language and these guides cause the Court . . . (App. 152-153)

Furthermore the court made clear its view of the scope of the Act during trial by its questioning of counsel:

> The Court: [addressed to counsel for plaintiff] May I ask you a question? If your theory is correct, why do you need this evidence? If your theory of pick-up and delivery and your operational theory is correct, why do you need any of this evidence of control? (App. 41)
>
> The Court: Well they [the defendant] would be justified in the sense of putting that evidence on for the purpose of showing that there is no control, number one, under the borrowed servant doctrine. But I don't know what purpose it would serve for them if the very nature of the business transaction makes the trucking company the agent. What difference does it make whether there is any control or not? I am just asking the questions. (App. 41)
>
> * * * * *
>
> The Court: Didn't they hold—
> Mr. Corrigan: What's that, sir?

The Court: —In effect, in substance and effect, the traditional agency standard should apply.

Mr. Corrigan: In the—

The Court: And for the purposes of determining whether he is an employee? (App. 147)

The Court: Now, aren't you entitled to look to the law of "agency" to determine whether he was an employee of the railroad? (App. 147)

It is thus abundantly clear that the district court knew and understood the competing legal theories, and accepted the *Smith* formulation as a correct interpretation of the Act (though recognizing that the question "presents serious difficulty").

Moreover, petitioner continually urged the "agency" theory on the district court. See Appendix 22, 26, 146. Having been successful in persuading the district court to adopt an erroneous construction of the Act, he now seeks to rely on the one element which the court undoubtedly rejected—the finding of an employment relationship between Kelley and SP.

Finally, we urge that petitioner did not brief to the Court of Appeals any question with regard to interpretation or construction of the district court's findings. He simply asserted there was a finding of an SP employment relationship, when a literal reading did not disclose it. The findings have an obvious failure to find a jurisdictional fact—an employment relationship with a common carrier railroad. If petitioner wished to overcome the obvious failure, he should have advanced his reasons and authorities to the court below. He did not do so. The result is, any question of interpretation of the findings:

i) was not briefed or urged to the Court of Appeals,

ii) is not briefed here,

iii) does not present conflict in the circuits, and

iv) does not present questions of importance worthy of this Court's review.

VII Petitioner's Case Authority Does Not Stand for an Enlarged Plaintiff Class

Petitioner relies on cases from the Third Circuit (*Bryne* [sic] *v. Pennsylvania R.*, 262 F.2d 906 (3rd Cir. 1959)), Fourth Circuit (*Smith v. Norfolk & Western R.*, 407 F.2d 501 (4th Cir. 1969)), Sixth Circuit (*Cimorelli v. New York Cent. R.*, 148 F.2d 575 (6th Cir. 1945)), *Pennsylvania R. v. Roth*, 163 F.2d 161 (6th Cir. 1947)), *Pennsylvania R. v. Baralian* [sic], 172 F.2d 710 (6th Cir. 1949)), Seventh Circuit (*Schroeder v. Pennsylvania R.*, 397 F.2d 452 (7th Cir. 1968)) and Tenth Circuit (*Missouri-K-T R. v. Hearson*, 422 F.2d 1037 (10th Cir. 1970)).

We agree with petitioner (brief p. 30) that, with the exception of the *Smith* case, all the foregoing cases have a conventional understanding of the scope of the plaintiff class—i.e., employment. Furthermore, despite the varying factual circumstances, all find the respective plaintiff or decedent to be an employee. None, except *Smith*, state or hold that agents or their employees are within the plaintiff class. Therefore none of these cases, except *Smith*, has any bearing on the question before the Court. The specific language holding the plaintiff to be an employee was previously quoted from the *Cimorelli*, *Barlion* and *Roth* decisions. In *Schroeder* the court says, "In view of both the testimony concerning control . . . we believe there was a genuine factual issue as to whether Schroeder was an 'employee' . . ." (p. 456). In *Hearson* the court, noting that the district court relied on *Smith v. Norfolk & Western R.*, but not discussing or relying on it itself, held "Hearson was an employee . . ." (p. 1042).

Reliance on this authority is therefore misplaced.

VIII. No Other Factors Present in This Case Are Sufficient to Establish an Employment Relationship.

Petitioner makes a variety of miscellaneous arguments which can best be dealt with one after another.

A. TARIFF RESPONSIBILITY DOES NOT ESTABLISH EMPLOYMENT.

Petitioner appears to argue at several points that inclusion of a service in a tariff is sufficient to make the work "railroad work."

However, the fact is, every railroad is required by law to file tariffs covering a great variety of services which it does not perform. Section 6 of Part I of the Interstate Commerce Act, 41 Stat. 474, 49 U.S.C. § 1 *requires* the filing of schedules of rates for all charges for "transportation" as defined in § 1(3) (a) of the Interstate Commerce Act. The definition of transportation is a wide one and includes "all instrumentalities and facilities of shipment or carriage . . . and all services in connection with the receipt, delivery . . . and handling of property transported." As so defined, the term is broader than the pure transportation service of which railroad common carriage consists. It includes services such as icing of cars, weighing, storage, and loading and unloading. The mere publication of a tariff does not make every service covered in it part of railroad common carriage, *Republic Carloading and Distributing v. Missouri Pacific R.*, 302 F.2d 381 at 387 (8th Cir. 1962), or require that persons performing the services be employees of the railroad common carrier. See *United States v. Interstate Commerce Comm.*, 352 U.S. 158 (1956).

B. NON-DELEGABLE DUTY AND OPERATIONAL ACTIVITY CONCEPTS DO NOT CREATE EMPLOYMENT.

Petitioner states, "The work being performed by petitioner was of such a nature that respondent, Southern Pacific Company, could not delegate that work as a matter of law." (brief p. 26) This thesis was also accepted by the

district court. (Finding IX, App. 30) A related contention is that performing an "operational activity" automatically makes one an employee. (footnote 10, p. 24 of petitioner's brief)

The concept of non-delegable duty has long roots in tort theory (see Restatement of Agency 2d, Ch. 14, Title C, § 491 et seq.). The concept of operational activity comes from *Sinkler v. Missouri P. R.*, 356 U.S. 326 (1958). The one covers essentially the place where work is to be performed, the other certain kinds of activity affecting employees. But in order to have the benefit of these concepts one must already be an employee. They offer protection for a group that does not have automatic coverage (i.e. workmen's compensation) for work connected injury. They do not extend a measure enacted for rail employees to groups which have another employment affiliation. These concepts do not create employment where none truly exists.

While we find no case in this Court considering the precise question of whether there is such a thing as non-delegable work, the Ninth Circuit has considered it twice:

In *Norman v. Spokane-Portland & Seattle Ry. Co.*, 101 F. Supp. 350 (1950), the plaintiff Norman was an employee of a private construction company which had been hired by the railroad to repair a bridge. Norman was injured and sued the railroad under the F.E.L.A. claiming "the railroad is under a non-delegable duty to perform such work by its own employees and is therefore liable to any workman injured thereon." (p. 351) The district court in a well-reasoned opinion rejected this contention, stating:

> "The court is of opinion a railroad company may employ a contractor to repair bridges. The duty of the railroad company to keep such transportation facilities in reasonable repair is not nondelegable so far

as employees of the independent contractor are concerned." (p. 351)

The Ninth Circuit affirmed in a *per curiam* opinion "for the reasons given in the district court's opinion." 192 F.2d 1020 (1951)

The same issues reappeared two years later in *Dougall v. Spokane, Portland & Seattle Ry.*, 207 F.2d 843 (1953, 9th Cir.). Plaintiff Dougall was an employee of Morrison-Knudsen who had been hired to perform work on the right of way. In the performance of the work Morrison-Knudsen used a motor truck and flatcar which violated several safety acts. Plaintiff contended that the work of repair, rehabilitation and improvement of the roadway of a railroad is in its nature such as to be non-delegable insofar as the rights and remedies under F.E.L.A. of an employee doing the work are involved. Plaintiff argued:

> ". . . the test is whether the duty to keep in repair its tracks and roadbed is one that the railroad can assign to anyone and absolve itself from any liability flowing from the failure to furnish a safe place in which to work to those making the repairs." (p. 846)

The Ninth Circuit rejected plaintiff's reasoning, however, citing *Norman* and holding that:

> "The liability under F.E.L.A. exists only when there is employment. The expressed condition is that the injury to or death of 'the employee' occurs 'while he is employed by such carrier'." (p. 845)

In addition to these two cases, we believe this Court's construction of the 1939 amendments to the F.E.L.A., while not direct authority, does shed light on the question. Exactly the same sort of contention, i.e., that the Act was intended to apply to certain kinds of typical railroad opera-

tions, was made in *Reed v. Pennsylvania R.*, 351 U.S. 502 (1956). Martha Reed was employed by the Pennsylvania at its general office in Philadelphia. Her duties consisted of filing tracings of drawing and having blueprints made which were sent to all parts of the system. She was injured when a cracked window pane blew in upon her. She was a clerical employee who faced, not the hazards of switching box cars, but those of "file cabinets and other office furniture." The defendant railroad lamented that to construe the Act to include Ms. Reed would amount to inclusion of virtually all roalroad employees. The Court answered, "The benefits of the Act are not limited to those who have cinders in their hair, soot on their faces, or callouses on their hands." Martha Reed had argued in her brief, "A test based on physical proximity is untenable." This Court agreed, holding that exposure to the special hazards of the railroad industry is no part of the test of the Act ("There is no meaningful distinction, in terms of whether the employee's duties are clerical or not . . ."). The case rejects an activity test, whether related to tariff responsibilities, agency status, clerical work or what have you, and embraces an employment test. The same logic should be applied here.

Finally, even if one thought there were certain kinds of intrinsically railroad work (e.g. locomotive engineer), still that would not extend to the facts of this case. Even the *Smith* court conceded, ". . . historically and traditionally the railroad is responsible neither for loading nor for unloading . . ." 407 F.2d at 503. It is a commonplace that railroads do not unload, especially when dealing with carload lots, as here. *Republic Carloading and Distributing v. Missouri P. R.*, 302 F.2d 381 (8th Cir. 1962), *Secretary of Agriculture v. United States*, 347 U.S. 645 (1954). Surely such work cannot be part of the "franchise," as petitioner argues.

C. FREE TRANSPORTATION DOES NOT ESTABLISH EMPLOYMENT.

Petitioner contends that SP treated the unloading personnel as "employees" because at various times in the past they had been granted either free or reduced-rate rail transportation. This argument fails to note:

i) the statute, 34 Stat. 584, 49 U.S.C. § 1(7) does *not* say only railroad employees may be issued free passes. A broad range of people may be given free transportation, including "the employees of common carriers, and their families . . ." PMT is a common carrier (App. 13). *United States v. Erie R.*, 236 U.S. 259 (1915) appears to sanction the very exchange of passes with other "common carriers" which took place here.

ii) The transportation may also have been lawful under state laws, e.g., California Public Utilities Code § 521 et seq. See especially §§ 527-528, which seems to expressly contemplate that which was done here.

iii) Even if unlawful, it would be just that—a criminal violation, not a finding of employment.

D. IT IS NOT NECESSARY TO ENLARGE THE PLAINTIFF CLASS IN ORDER TO REGULATE THE CONTRACTING OUT OF WORK.

Petitioner argues that this case must be reversed, else, respondent will have "the power, as well as the authority to delegate portions of their franchise at their whim and at their unbridled discretion." (brief p. 27)

It is an old notion and deserves to be put to rest. One should not attempt to regulate the contracting out of work by abortive construction of a work-injury law. Such an effort would be like deciding the question of whether Longshoremen or Teamsters should be allowed to stuff cargo containers by a fanciful construction of the Longshoremen and Harbor Worker's Compensation Act. This is the long

way around of saying that other laws and institutions exist to control the contracting out of types of work (see *Order of Railroad Telegraphers v. Chicago & N.W. R.*, 362 U.S. 330 (1960)), and one need not rely on construction of a work injury statute to accomplish that purpose. It is foolish to suppose that the United Transportation Union, for example, would allow the SP to contract out the jobs of locomotive engineers, just as it is naive to suppose that the International Brotherhood of Teamsters would sit idly by while somebody tried to award to rail craft unions the jobs of unloading piggyback and multilevel cars.

E. UNSUPPORTED FACTUAL CONTENTIONS ON DIRECTION AND CONTROL CANNOT SUBSTITUTE FOR A FINDING OF EMPLOYMENT.

Petitioner asserts that, "Southern Pacific Company supervisors directly and indirectly participated in managing and directing the automobile unloading process." (brief p. 8) A similar assertion appears on p. 15, "Pacific Motor Trucking Company, from its highest level down to its lowest, took directions and instructions from Southern Pacific Company . . . with regard to operation of tri-level railroad cars." We wish to point out that these statements are completely unsupported by references to the Appendix. They are also beyond anything contained in the district court's findings.

Petitioner argues that an SP damage prevention supervisor gave him directions (brief p. 8), and that an instruction booklet exerted control over him (brief p. 10). However, the uncontradicted evidence was that the booklet was published *two years after* the accident—Reporter's Transcript from district court, p. 198; Clerk's Record from district court, p. 67. The same is true of the damage prevention supervisor, Jarvis. His occasional duties in the area commenced only in 1964—*after the accident*. (App.

115, 116; Reporter's Transcript, p. 400 typed, p. 452 stamped) Furthermore, even if the described activities had taken place at the time of the accident, the purport of the evidence is not direction and control but "discussion," "advice" and cooperation, e.g., "It's a mutual thing." (see testimony of Jarvis, App. 118) At most this is an example of "minimum cooperation necessary to carry out a coordinated undertaking." *Shenker v. Baltimore & Ohio R.*, 374 U.S. 1 at 6 (1962); *Standard Oil v. Anderson,* 212 U.S. 215 (1909).

F. THE CONCEPT OF UNSEAWORTHINESS SHOULD NOT BY ANALOGY EXPAND THE STATUTORY SCOPE OF THE F.E.L.A. PLAINTIFF CLASS.

It is not clear whether petitioner is arguing that construction of the F.E.L.A. plaintiff class will restrict the scope of the Jones Act, 41 Stat. 1007, 46 U.S.C. § 688, or that the F.E.L.A. plaintiff class should be enlarged by analogy to the remedy of unseaworthiness.

Either argument should be rejected. Since we are arguing that the F.E.L.A. class should not be changed, it is not clear how this would restrict the Jones Act other than ways in which it presently does. On the other hand, there is no land-based law comparable to unseaworthiness, and no policy consideration comparable to admiralty's special solicitude for the welfare of those who venture upon hazardous sea voyages, which underlies unseaworthiness. The statutorily created F.E.L.A. plaintiff class should not, therefore, be enlarged through this analogy.

IX. Policy Considerations Urge the F.E.L.A. Plaintiff Class Not Be Expanded.

This case raises perfectly the question of whether the F.E.L.A. plaintiff class should be enlarged. It does so because:

i) alter-ego issues—"conduit," "instrumentality," "adjunct," etc.—were abandoned by petitioner,

ii) the district court was unable to find an employment relationship with the defendant railroad,

iii) there are no special or unique facts which distinguish petitioner's situation from that of any other teamster performing piggyback or multilevel services, and

iv) there are no other questions on which review is sought or which are worthy of review by this Court.

If the plain wording, statutory history and settled judicial construction are insufficient to answer that question, we urge the following considerations.

On any suggested reformulation of the plaintiff class (e.g., to include those performing accessorial services, nondelegable duties, agents, etc.) large, new groups of persons will be drawn into the F.E.L.A. It is impossible, however, to justify expanding the F.E.L.A. to new groups as a remedy for work-connected injury. Justices of this Court have said it often enough:

> "This cruel and wasteful mode of dealing with industrial injuries has long been displaced in industry generally . . . It is, of course, the duty of courts to enforce the Federal Employers' Liability Act, however outmoded and unjust in operation it may be."

Wilkerson v. McCarthy, 336 U.S. 53 (1948), concurring opinion, pp. 65-66. More recently it has been characterized as "drawn-out, costly and uncertain process that was dismissed long-ago . . ."[9]

---

9. The Report of the National Commission on State Workmen's Compensation Laws, p. 45, transmitted to the President and Congress July 31, 1972; Government Printing Office, July 1972. See also pp. 25 and 52.

It used to be argued workmen's compensation was inadequate. With the advent of the Report of the National Commission on State Workmen's Compensation Laws,[10] the passage of amendments to the Longshoremen's Act,[11] the pendency of bills formulating federal workmen's compensation standards,[12] and the pressure for legislative change being exerted by organized labor, that argument will soon evaporate.

In the meantime, the evils of the F.E.L.A. remain. The only unbiased study is that of the Railroad Retirement Board, Railroad Industry Work Injuries, 1938-1940 (2 volumes). The Board found the Act fails to meet every criterion of a well-designed, equitable work injury compensation system. The F.E.L.A. has no system for periodic, regular payments during the period of injury, featuring instead settlements or judgments years after the accident. It has no certainty of recovery, many cases being lost or settled for small amounts because of compromising fact situations. It has all the aspects of a lottery, with wide variation in the level of payments for similar injuries, not only from one part of the country to another but within individual rail companies. It pits employee against employer at the very moment when he most needs help—i.e., when he is injured. The principal author of the Board's study, Jerome Pollock, has written, ". . . any objective appraisal of this Act is bound to sound like a denunciation."[13] The data may be old, but no one has suggested the deficiencies of the system do not remain.

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10. Id.

11. § 86 Stat. 1251, 33 U.S.C. § 901, Public Law 92-576, 92d Congress, 2d Session.

12. HR 8771, 93rd Congress, 1st Session.

13. § 36 Cornell Law Quarterly 236 (1951).

On the contrary, these evils are inherent, and are even more entrenched and pronounced as time goes along. They are bound to poison a concurrently functioning system of workmen's compensation. For example, workmen's compensation can provide for rehabilitation in severe injury cases.[14] It is impossible, however, to imagine rehabilitation succeeding where the personal injury lawsuit mechanism and the financial incentives of a jackpot verdict are hovering over the injured person from the moment of his accident.[15]

The accepted norm for the adjustment of work-connected injury is workmen's compensation. In this country we are developing a truly effective and innovative compensation system. What is needed is to extend this accepted norm to the two industries in which it is lacking (rail and maritime), and to abolish the F.E.L.A. We ought not to extend the F.E.L.A. to new groups which do not now have it.

CONCLUSION

The Judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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14. Report of the National Commission on State Workmen's Compensation Laws, supra., Ch. 4.

15. Id. p. 25.

(Note in regard to appendix follows)

Note in Regard to Appendix

References in the text of this brief to pages of the Appendix are abbreviated "App. ....."

The Appendix contains the following errors and omissions of designated and agreed items, which may be material to respondent's case:

1) The Judgment of the Court of Appeals appears not to be printed.

2) On page 9, "Findings and Award from the Workmen's Compensation Appeals Board," was actually attached as an exhibit to the affidavit of R. K. Booth, which starts on p. 12.

3) On page 56 after the third line, two lines of testimony are omitted. They read:

> The Court: Was this before or after 1963?
>
> The Witness: I think it was before (Reporter's Transcript from district court, p. 115)

4) On page 143 about the middle of the page, immediately after the answer:

> The Witness: I took my orders directy from the terminal manager, Mr. George Hellwig.

Five lines of testimony are omitted. They read:

> The Court: Did you take any orders from the Southern Pacific personnel?
>
> The Witness: No, sir.
>
> The Court: At any time between '58 and '63?
>
> The Witness: No, sir.
>
> (Reporter's Transcript, pages 484 and 485 typed, 537 and 538 stamped)

5) On page 86 between the matter from pages [217] and [232], the entire designated testimony of witness Manuel Teijeiro is omitted. It reads as follows:

"MR. ENGEL: Q. Now, on the day of the accident, how did you first become aware of the accident?

A. Well, saw—well, I was at the. . . . We saw an ambulance coming down to the yard. My supervisor and partner were together, checking some material." (Reporter's Transcript, stamped page 236)

"Q. Now, did you have—when you got to the scene where Mr. Kelley was, was Mr. Kelley still there?

A. No, they were taking him through the cars on a stretcher to the ambulance.

Q. All right, did you see him being taken away on a stretcher?

A. Yes."

(Reporter's Transcript, stamped page 250)

Commencing with the testimony of Witness Manuel Teijeiro, which starts at page 230 of Volume I of the Reporter's Transcript and continues to the end of that volume, a *double numbering system* appears in the transcript, viz. typed numbers and stamped numbers. This is apparently because the testimony of Teijeiro was separately transcribed and then inserted later when the remainder of the testimony was transcribed.

The page references in the Appendix (printed in brackets) are to the typed page numbers of the transcript. However, commencing on page 150 of the Appendix the references are to the stamped numbers. Also the material on page 153 is in part a duplication of the material appearing at the bottom of page 149 commencing with [545].

We find the Appendix confusing to read because it does not identify the witness (and in some cases documents). In the hope that it will aid in understanding, and does not violate the rule, we offer the following INDEX TO THE APPENDIX.

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SUPREME COURT, U. S.

FILED

SEP 27 1974

MICHAEL RODAK, JR., C

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1973

No. 73-1270

EUGENE C. KELLEY,
Petitioner,

vs.

SOUTHERN PACIFIC COMPANY, a corporation,
Respondent.

PETITIONER'S REPLY BRIEF

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1973

No. 73-1270

EUGENE C. KELLEY,
Petitioner,

vs.

SOUTHERN PACIFIC COMPANY, a corporation,
Respondent.

PETITIONER'S REPLY BRIEF

I
RESPONDENT HAS FAILED TO ATTEMPT TO ARGUE THE ISSUE PRESENTED

Respondent Southern Pacific Company, in its brief, while repeatedly referring to the evidence, fails to mention *Federal Rule of Civil Procedure* §52(a), nor argue the uncontradicted fact that the District Court as well as counsel for both parties understood that a factual question was being presented and decided by the District Court.

Petitioner's Petition for Writ of Certiorari presented one issue, i.e., a factual question had been

decided by the District Court and the Ninth Circuit Court of Appeals, contrary to FRCP §52(a), exceeded its appellate review powers by refusing to recognize that "employee" status was a question of fact.

It seems incredulous to petitioner that despite this single issue being presented by the Petition for Writ of Certiorari, respondent Southern Pacific Company failed to make a single reference to why the Ninth Circuit Court of Appeals' decision was not in violation of FRCP §52(a).

It is clear that petitioner, under the Federal Employers Liability Act, is entitled as a matter of right to a trial by jury (*Schulz v. Pennsylvania Ry. Co.*, 350 U.S. 523, 76 S.Ct. 608, 100 L.Ed. 668). The record is clear that the right to a jury trial was recognized by the parties to this action and that by stipulation this right was partially waived regarding the limited factual issue of "employee" status (See Brief of Petitioner, Appendix A).

In those instances, when a party, who is entitled as a matter of right to a jury trial, waives that right, and submits factual questions to the Court, appellate review is restricted in the same manner as if that factual question had been decided by the jury (*United States v. Jefferson Electric*, 291 U.S. 386, 407, 54 S.Ct. 450, 78 L.Ed. 874; *Dooley v. Pease*, 180 U.S. 126, 131, 21 S.Ct. 329 45 L.Ed. 457).

While it is true that in suits in equity, a trial court's findings of fact are never conclusive (*United States v. U.S. Gypsum*, 333 U.S. 364, 395, n. 14, 68 S. Ct. 525, 92 L.Ed. 746); in actions at law, where a

party is entitled as a matter of right to a trial by jury, the party does not diminish or waive his rights granted pursuant to the Seventh Amendment of the United States Constitution by submitting a factual issue to the Court as opposed to a jury.

As this Court stated in *United States v. Jefferson Electric, supra,* the Court in such instances is exercising the function of a jury and its findings are on the same plane as if embodied in a jury's special verdict.

The attempt by respondent Southern Pacific Company to ignore this Court's mandate that determination of "employee" status under the Federal Employers Liability Act is a question of fact,[1] is an attempt to transform factual considerations into legal considerations which ultimately would result in unlimited appellate court power.[2]

It is submitted that the restrictions placed on appellate review both by the Seventh Amendment of the United States Constitution and *Federal Rules of Civil Procedure* §52(a) are of sufficient significance to warrant comment, not only by Respondent Southern Pacific Company, but also the Ninth Circuit Court of Appeals in those instances when the sole question presented on appellate review is the propriety of applying Rule 52(a) to an admittedly factual consideration.

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[1] *Baker v. Texas and Pacific Railroad,* 359 U.S. 227; *Ward v. Atlantic Coast Line,* 362 U.S. 396.

[2] See concerns expressed in *Appellate Review of Findings of Fact Based on Documentary or Undisputed Evidence,* 49 Virginia Law Review, 506, 537.

As set forth in Petitioner's opening brief,[3] the criticism of the Ninth Circuit Court of Appeals' decision, in the case at bar, is that it is the only decision which has reversed a District Court's finding of "employee" status under the Federal Employers Liability Act. Even the decisions which were erroneously relied on by the Ninth Circuit Court of Appeals were instances where the appellate court affirmed a District Court's factual conclusion regarding "employee" status. It is this very uniqueness of the Ninth Circuit Court of Appeals' decision in the case at bar that highlights the importance of requiring appellate compliance with the Seventh Amendment of the United States Constitution and §52(a) of the *Federal Rules of Civil Procedure.*

II

RESTATEMENT, AGENCY 2d, §220 DOES NOT CONTEMPLATE EXCLUSION OF ANY SPECIAL CLASS OF "EMPLOYEE"

Respondent Southern Pacific argues that this Court should recognize the right of respondent Southern Pacific Company to determine, itself, which individuals shall be covered by the Federal Employers Liability Act.

Petitioner has never claimed that the plain wording of the statute does not require "employee" status, nor that the legislative history does not confine the Act to "employees." Petitioner contends, however, that by allowing Respondent Southern Pacific Com-

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[3]See Appendix B, Brief of Petitioner.

pany to determine who is an "employee" historically has not been the intention of this Court nor of the Legislature.

As this Court stated in *Baker v. Texas and Pacific Railroad Company, supra,* the Federal Employers Liability Act does not use the term "employee" in any special sense. That is to say that the rules and tests normally used to determine "employee" status are the same whether under the Federal Employers Liability Act or any other judicial determination.

Respondent Southern Pacific Company does not present this Court with any substantiation for a conclusion by this Court that "employee" status under the Federal Employers Liability Act was intended or should be entitled to a special judicial interpretation. Particularly does Respondent not provide this Court with any justification for concluding that the Legislature or this Court ever intended that "employee" status under the Federal Employers Liability Act shall be determined by the railroads for which the Federal Employers Liability Act was enacted specifically as a regulative statute to stand between the railroad and those individuals whose services they secure to perform railroad operational activities. This Court has long recognized that the Federal Employers Liability Act is remedial in nature and humanitarian legislation designed to give benefit to the individuals actually performing operational activities of the railroad as opposed to the railroad itself (*Urie v. Thompson,* 337 U.S. 163, 182, 69 S.Ct. 1018, 93 L.Ed. 1282 [1949]).

a) Legislative and Judicial History Does Not Exclude Plaintiff.

The logic offered by respondent Southern Pacific Company bears comment. Respondent offers a rather detailed analysis of the legislative history, suggesting that Congress did not intend coverage under the Federal Employers Liability Act to be extended to certain classes of individuals, specifically "teamsters."

Respondent concludes therefrom that so long as the railroad hires "teamsters" to perform railroad activities, then the individual performing said railroad activities is not entitled to the benefits of the Federal Employers Liability Act. Not because Congress did not intend to provide coverage to individuals who were performing those activities, but rather because respondent railroad company has developed a management decision to delegate responsibilities which are exclusively controlled and regulated by federal agencies and thus avoid its responsibilities under the FELA. Then in justification of this technique, designed to avoid such responsibilities, it attempts to convince this Court that its [respondent's] intentions are in some way the intentions of the Legislature as they existed in 1939.

Respondent does not provide this Court with any legislative history which justifies the conclusion that Congress in any way intended that a railroad company was authorized to develop managerial policies as a technique to avoid its responsibilities under the Federal Employers Liability Act. It is respectfully requested that this Court not sanction such a practice

which would allow individual railroad manipulation of a federal regulatory and humanitarian statute. The application of the Federal Employers Liability Act was intended by Congress to be applied uniformly to all railroads.

Furthermore, Respondent's references to the intention of Congress in passing amendments in 1939 to the Federal Employers Liability Act are misleading. The issue being considered by Congress at that time was whether to include under the Act express companies, freight forwarding companies, and sleeping car companies. That is to say, the Committee was considering whether express companies, freight forwarding companies and sleeping car companies should also be *liable* to their employees as railroads are liable to their employees.[4] Congress declined to expand the defendant class under FELA.

Respondent failed to include a portion of the proposed bill.[5] The original bill referred to by Respondent reads: "Every common carrier by railroad, including every express company, freight forwarding company, and sleeping car company engaged in commerce . . . shall be liable in damages. . . ."

The testimony referred to by Respondent would seem to be self-evident. Obviously, these companies in question did not desire to subject themselves to being liable to their employees under Federal Employers Liability Act. Their desires are quite similar

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[4]See: *Hearings, Senate Committee on the Judiciary*, 76th Congress, First Session, 1939.

[5]See Brief for Respondent, Page 16.

to those expressed by Respondent in the case at bar. Respondent also wishes it was not subject to the Federal Employers Liability Act.

Respondent has provided this Court with no authority for the proposition that Congress ever considered whether individuals who may ostensibly be employed by express companies of freight forwarding companies or sleeping car companies were to be excluded from the benefits of the Federal Employers Liability Act if they were *in fact* performing activities of the railroad and met appropriate legal tests as "employees" within the meaning of the Federal Employers Liability Act.

b) Baker v. Texas and Pacific Does Not Contemplate Exempting Any Special Class.

Respondent Southern Pacific Company contends that an exception to the application of *Restatement, Agency* 2d, §220 should be created. Namely, Respondent desires this Court to exempt from application of the *Restatement, Agency* 2d, §220 in determining "employee" status under the Federal Employers Liability Act *any* individual who is an employee of an agent of a railroad. It is Respondent's contention that an employee of an agent cannot as a matter of law meet the test set forth by this Court in *Baker v. Texas and Pacific Railway, supra;* and *Ward v. Atlantic Coast Line, supra.*

However, neither Respondent nor the Ninth Circuit Court of Appeals has provided this Court with either legislative history or judicial decision to support the

proposition, much less justify it, that any class of individual should be specifically exempt from the tests historically recognized by this Court in determining "employee" status.

Contrary to Respondent Southern Pacific Company's contention, this Court's decisions in *Baker v. Texas and Pacific Railway Co., supra,* and *Ward v. Atlantic Coast Line, supra,* do not extend the Act to "significant new groups." On the contrary, this Court specifically concluded that each case is to be governed by the relevant factors existing in that specific case. An injured individual cannot claim benefits under the Federal Employers Liability Act simply because he is a member of *any* specific group.

c) Doctrine of Borrowed Servant Is Not Applicable.

Likewise, Respondent, in a rather obvious misstatement of the law, characterizes this Court's two previous rulings in *Baker v. Texas and Pacific Railway Co., supra,* and *Ward v. Atlantic Coast Line, supra,* as applications of the "borrowed servant" concept of employment.[6]

For reasons best understood by Respondent Southern Pacific Company to have this Court limit the application of *Baker v. Texas and Pacific Railway Co.* to a concept of "borrowed servant", Respondent fails to supply this Court with any justification for recognizing such a limited construction. The factual conclusion of determining "employee" status under the

[6]See: Brief for Respondent, p. 14.

Federal Employers Liability Act is not synonymous with application of the borrowed servant doctrine.[7].

For purposes of the case at bar the limited construction sought by Respondent Southern Pacific Company is not material. The test for determining "employee" status pursuant to *Restatement, Agency* 2d, §220 and this Court's ruling in *Baker v. Texas and Pacific Railway Co., supra*, is the same test for determining "employee" status under the borrowed servant doctrine [see *Restatement, Agency* 2d, §227 (Comment a)].

Contrary to Respondent Southern Pacific Company's contention, Petitioner does not desire to expand the plaintiff's class beyond that specified in the statute, namely "employees" of a railroad. However, Petitioner does reject Respondent's attempt to restrict the already existing class of "employee" by: (1) refusing to comply with this Court's mandates set forth in *Baker v. Texas and Pacific Railway Co., supra*, that each case shall be determined on its individual facts as tested by application of *Restatement, Agency* 2d, §220; (2) by exempting from application of *Restatement, Agency* 2d, §220 all persons who are also employees of an agent of a railroad; (3) by concluding that railroads are not subject to the common law standard of determining "employee" status as set forth in *Restatement, Agency* 2d, §220, but rather are governed by a doctrine of "borrowed servant".

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[7] *Loaned Servant Doctrine Under Federal Employers Liability Or Safety Appliance Act*, 1 A.L.R.2d 302, n. 3.

III

SMITH v. NORFOLK AND WESTERN RAILWAY COMPANY IS CONSISTENT WITH SUPREME COURT OF THE UNITED STATES DECISIONS.

Respondent Southern Pacific Company contends that *Smith v. Norfolk and Western Railway Company* is an erroneous application of the standards set forth in *Restatement, Agency* 2d, §220.

Respondent ignores the fact that *Smith v. Norfolk and Western Railway Company* was an appeal from a denial of the railroad's motion for summary judgment. To begin with, *Smith v. Norfolk* then stands for the proposition that determination of "employee" status does present a question of fact to be decided by the jury and therefore the District Court properly denied the railroad's motion for summary judgment.

Secondly, *Smith v. Norfolk and Western Railway Company* stands for the proposition that the appellate court affirmed a District Court's judgment that sufficient factual bases existed to require the determination of "employee" status to be submitted to a jury.

Thirdly, *Smith v. Norfolk and Western Railway* specifically refused to decide whether the concepts of "agent" as promulgatel in *Sinkler v. Missouri Pacific Railway,* 356 U.S. 326, "extends" application of the Federal Employers Liability Act.

Rather, the Fourth Circuit decision, while *"supplementing"* the opinion of the District Court, singled out one of the appropriate factors set forth in

Restatement, Agency 2d, §220(h) as being particularly persuasive in justifying their conclusion that determination of "employee" status is a factual decision to be submitted for the jury's consideration.

This single factor which the Fourth District found particularly persuasive was "whether or not the work [being performed] is part of the regular business of the employer."

The Tenth Circuit recognizes that *Smith v. Norfolk and Western Railway Company* is not in conflict with decisions of the other circuits including that of the Ninth Circuit (See *Missouri-Kansas-Texas Railway Co. v. Hearson,* 10th Cir. (1970), 422 F.2d 1037, footnote 14).

It is submitted that Respondent Southern Pacific Company desires this Court to conclude that *Smith v. Norfolk and Western Railway Company* is not harmonious with the decisions in other circuits, not because this is a fact, but rather such an argument can be used as a vehicle to have this Court create exceptions for particular classes of individuals; classes to be chosen by Southern Pacific as being exempt from the benefits and protections of the Federal Employers Liability Act.

Contrary to Respondent Southern Pacific's suggested analysis of *Smith v. Norfolk and Western Railway Company,* the opinion is devoid of any reference that the District Court in *Smith v. Norfolk and Western Railway* relied on any standard other than that set forth in the *Restatement, Agency* 2d, §220.

Respondent Southern Pacific Company suggests to this Court that the use of the term "agent" is mutually exclusive to the use of the term "servant." The two terms are not mutually exclusive. *Restatement, Agency* 2d, §2 provides:

> "(2) A servant is an *agent* employed by a master to perform service in his affairs whose physical conduct in the performance of the service is controlled or is subject to the right to control by the master." (Emphasis added)

As the Fourth Circuit stated in *Smith v. Norfolk and Western,* 407 F.2d 501, 502:

> "It is enough here that under traditional agency tests the decision of the district court that the undisputed facts establish agency does not appear erroneous."

In contrast to the Fourth Circuit's recognition that the District Court's conclusion that there existed a factual question in determining "employee" status, the Ninth Circuit, in the case at bar, concluded to the contrary. In fact, as set forth above, the Ninth Circuit ignored that the determination of "employee" status was a factual question. *Smith v. Norfolk* is recognized as consistent.[8] The case at bar is admittedly not consistent and is uniquely the first case not to follow *Baker v. Texas and Pacific Ry. Co.*

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[8]See: *Missouri-Kansas-Texas Ry. Co. v. Hearson,* supra.

IV

THE DISTRICT COURT'S DECISION IN THE CASE AT BAR APPLIED THE CORRECT STANDARD FOR DETERMINING EMPLOYEE STATUS.

It is contended by Respondent Southern Pacific Company that the District Court adopted a special concept of employment for purposes of FELA.

To begin with, Respondent conveniently ignores the authority cited by the District Court to support its factual conclusions (Jt. App., 30). Respondent chooses to emphasize only one of the authorities relied on by the District Court and ignore the fact that the District Court understood its responsibilities well enough to single out the most appropriate authorities on the issue before it and exclude any irrelevant authorities. The Court specifically relied on *Baker v. Texas and Pacific Railway Co., Ward v. Atlantic Coast Line,* and *Restatement, Agency* 2d, §220, in addition to relying on *Smith v. Norfolk and Western Railway Co.*

Contrary to the Ninth Circuit Court of Appeals' decision and Respondent's assertions the District Court did not adopt a "special concept" of determining "employee" status under the FELA.

As set forth in Brief of Petitioner, pages 17-19, it was very clear not only to the District Court, but also to counsel for the respective parties, that the only question being submitted to the District Court for its consideration was a *factual* issue.

Thereafter, in its informal indication of its decision, the Court specifically relied on *Baker v. Texas*

and Pacific Railway Co. in commenting "that each case must be decided on its peculiar facts" and "no one feature of the relationship is determinative" (Jt. App. 152-153).

The Court then concluded that "on the facts presented and the record made in this case" the Court found that the:

> "work being performed by Eugene C. Kelley on July 3, 1963, was in fulfillment of a non-delegable duty of the railroad which brought him [Kelley] within the traditional agency relationship [to the railroad] as a matter of fact. . . ." (Jt. App. 152-153).

Both *Restatement, Agency* 2d, §§220 and 2 provide, in defining a servant, that he is a person employed to perform services in the affairs of another and is subject to the other's *right* to control. *Restatement, Agency* 2d, §2 specifically refers to the servant as an "agent" employed by a master.

Thus the interchangeable use of the term servant and agent is not a "special concept" as contended by Respondent Southern Pacific Company.

The District Court then entered findings which were directly correlated with the factors specified in *Restatement, Agency* 2d, §220, Comment h. (See Brief of Petitioner, pages 25-27).

The District Court specifically found that the responsibility for immediate supervision and control was that of Southern Pacific Company (Findings of Fact VIII, Jt. App., 29). And further, the Court specifically found that the work being performed by

petitioner at the time of his injury was in fulfillment of the non-delegable duties [performing services in the affairs of another] of Respondent Southern Pacific Company and that in so doing, brought the plaintiff within such a relationship to defendant Southern Pacific Company as to be covered by the Federal Employers Liability Act (Findings of Fact IX, Jt. App., 30).

This Finding of Fact did not conclude that the Petitioner, Kelley, was in such a relationship to Pacific Motor Trucking Company as to bring Petitioner within the coverage of the Federal Employers Liability Act. On the contrary, the Court found that a relationship existed specifically between Petitioner and Respondent so as to bring Petitioner within the coverage of the Federal Employers Liability Act.

The Court went on, in its Conclusion of Law, to also find that Petitioner was in such a relationship "to Southern Pacific Company" as to be covered by the Federal Employers Liability Act (Conclusions of Law, I, Jt. App., 30).

It is difficult for Petitioner to understand how the Respondent Southern Pacific Company can conclude from the above that the District Court found the Petitioner in such a relationship to Pacific Motor Trucking Company as to bring Petitioner within coverage of the FELA. The conclusion that Petitioner was covered by the Federal Employers Liability Act was based on the Court's factual and legal conclusion that such a relationship existed between Petitioner and Respondent Southern Pacific Com-

pany. The District Court specifically did not base its factual and legal conclusions on a relationship that existed between Petitioner and Pacific Motor Trucking Company.

The Findings of Fact by the District Court relative to Pacific Motor Trucking Company supported conclusions that Pacific Motor Trucking Company was performing services in the affairs of Southern Pacific Company. However, the Court did not conclude that simply because an agency relationship existed between Southern Pacific Company and Pacific Motor Trucking Company that *ipso facto* all employees of Pacific Motor Trucking Company were "employees" of Southern Pacific Company for purposes of FELA.

If Respondent's contentions were correct the Findings of Fact would have simply provided that (1) Pacific Motor Trucking Company was the agent of Southern Pacific Company; (2) Kelley was the employee of Pacific Motor Trucking Company. The Conclusions of Law then would have been that Kelley is covered by the Federal Employers Liability Act. Such findings and conclusions were neither submitted by Petitioner nor drafted by the District Court.

Finding of Fact IX (Jt. App. 30) specifically found that the work being performed by Petitioner at the time of his injury was performance of services in the affairs of Southern Pacific Company (affairs which Southern Pacific Company may be able to delegate but not do so and escape responsibility). Further, that performance of this work

brought plaintiff into such a relationship with Southern Pacific Company as to be covered by the Federal Employers Liability Act.

It is respectfully submitted that these findings, both factually and legally, when compared with the requirements set forth in *Restatement, Agency* 2d, §220, Comment h, and, when bolstered by the authorities relied on by the District Court, clearly show that the District Court did not adopt a "special concept of employment".

On the contrary, the District Court used the traditional concepts of factually determining "employee" status and in so doing relied on the very two decisions of the United States Supreme Court which clearly set forth the appropriate legal standards in reaching such a factual conclusion.

V

ASSUMING ARGUENDO THE DISTRICT COURT APPLIED THE LEGAL THEORY ASSERTED BY RESPONDENT, SUCH A THEORY IS CORRECT. SOUTHERN PACIFIC IS LIABLE FOR INJURIES SUFFERED BY EMPLOYEES OF "AGENTS" PERFORMING OPERATIONS ACTIVITIES OF THE RAILROAD.

Contrary to the Ninth Circuit's decision and Respondent's contentions, Petitioner does not nor has Petitioner contended, nor did the District Court find, that simply because Petitioner was an employee of Pacific Motor Trucking Company he was entitled to the benefits of the Federal Employers Liability Act.

This argument has been promulgated by Southern Pacific Company both before the Ninth Circuit as well as this Court with perhaps the hope on the part of Southern Pacific Company to obtain a ruling from this Court which will restrict application of the Federal Employers Liability Act regardless of whether it is relevant to the issue at bar.

However, notwithstanding that Petitioner feels that Southern Pacific's contention is irrelevant, Petitioner does feel that Southern Pacific Company is inaccurate.

This Court has previously acknowledged that an individual employed by an "agent" of a railroad who was injured while performing operational activities of the railroad is entitled to coverage under the Federal Employers Liability Act (*Ward v. Atlantic Coast Line*, 362 U.S. 396 at 397).

In *Ward v. Atlantic Coast Line*, Petitioner contended that the Turpentine Company was the "agent" of the respondent railroad, as this Court had previously construed that term in *Sinkler v. Missouri Pacific Railroad Company*, 356 U.S. 326 and consequently that Petitioner was entitled to coverage under the Federal Employers Liability Act. This Court rejected Petitioner's contention on the basis that insufficient evidence justified submitting that issue to a jury; not because the theory wasn't viable but that not adequate proofs had been presented. In commenting on what adequate proof might justify submitting this legal theory for jury determination of the question of "agent" this Court stated:

> "This was not a situation, as in *Sinkler,* in which the railroad engaged an independent contractor to perform operational activities required to carry out the franchise."

Contrary to the proofs in *Ward v. Atlantic Coast Line Railroad Company, supra,* in the case at bar, the proofs are clear that Petitioner Kelley was in fact performing operational activities of Respondent Southern Pacific Railroad Company which were required to carry out the franchise of said railroad. Furthermore, the District Court specifically entered a finding which factually supports that conclusion (See Findings of Fact, IV, Jt. App. 29).

It is suggested that this Court's conclusion in *Ward v. Atlantic Coast Line, supra,* does not create a new class of plaintiff as contended by Respondent Southern Pacific Company. An individual who is employed by an "agent" of a railroad company *and* performing operational activities required by the franchise of that railroad *at the time of his injury* is simply an individual who clearly meets the requirements of *Restatement, Agency* 2d, § 220 as being an "employee" of the railroad while he was performing the activities in question.

Contrary to the suggestion of Respondent Southern Pacific Company, such a conclusion does not provide coverage to any and all individuals who are employed by an agent of the railroad company. The relationship of the agent to the railroad company is but another factor in determining whether or not the indi-

vidual in performing his work is performing services "in the affairs of another". The fact that the work being performed by the agent and/or the "employee" is "operational activities required to carry out the franchise" of the railroad is simply a rather clear showing that the services being performed are, in fact, the affairs of another, i.e., the railroad.

This Court has long recognized that the real question presented in determining "employee" status under the Federal Employers Liability Act is, regardless of the technical distinction created by corporate management decisions, whether at the time the injury occurred the individual involved was performing work which can be fairly characterized as the operational activities of the railroad. In *Shenker v. Baltimore and Ohio Ry. Co.,* 374 U.S. 1, 11. This Court in commenting, in a non-common law analysis of FELA application and referring to the concept of "agent" as defined by this Court's earlier decision of *Sinkler v. Missouri Pacific Railroad Company, supra,* stated:

> "'it was the conception of this legislation [FELA] that the railroad was a unitary enterprise, its economic resources obligated to bear the burden of all injuries befalling those engaged in the enterprise arising out of the fault of any other member engaged in the common endeavor.'
>
> "If recovery were denied in this case, the railroads, by the simple expedient of doing each other's work, could tie their employees up in legal technicalities over the proper railroad to sue for injuries and perhaps remove from coverage of the Act a significant area of railroad activity."

This Court's acknowledgment in *Ward v. Atlantic Coast Line, supra,* of the special significance of activities which are the operational activity of the railroad is not uncommon in legal analysis. *Restatement, Agency* 2d, §214, Comment b, provides:

> *"Action illegal unless license:*
> When a license is required for the performance of acts, one having a license [respondent Southern Pacific Company] who delegates performance of the acts to another [Pacific Motor Trucking Company] is subject to liability for the negligence of the other. Thus, a trucking company doing an interstate business requiring a license is liable for the negligence of an independent contractor whom it employs to do some of the work."

In applying this same principle in the chapter dealing with a principal's liability to an employee or servant, the same conclusion is reached in *Restatement, Agency* 2d, §492.

Thus, the significant test whether determining the class of plaintiff (*Baker v. Texas and Pacific, supra, Ward v. Atlantic Coast Line, supra*) or the class of defendant (*Sinkler v. Missouri Pacific Railroad Company*) has centered on the nature of the work of the individual in question, whether he be the party injured or the party committing the injury, to the operation of the railroad defendant (*Linstead v. Chesapeake & Ohio* [1927]. 276 U.S. 28, 34). And this Court has consistently held that a railroad cannot obviate the duties it must bear under the Federal Employers Liability Act by shifting its railroad responsibilities

to a third party and thus avoid liability. Early in this Court's interpretations of "employee" status under a doctrine of loan servant, the same criteria was recognized by this Court as being critical (*Linstead v. Chesapeake & Ohio* [1927] 276 U.S. 28, 34; *Shenker v. Baltimore & Ohio Ry.* [1963] 374 U.S. 1, 11).

If an individual is injured while performing acts which are the operational activity of a railroad, which the railroad is required to carry out under its franchise, there would seem to be little doubt that the individual involved was injured while performing services in the affairs of the railroad company. It is just as clear, that in so doing the individual is subject to the railroad's right to control those activities.

Such a conclusion would seem to inevitably fit perfectly within the definition of a servant as defined by the *Restatement, Agency* 2d, §§220 and 2.

This Court has repeatedly recognized that modern concepts of corporate structure and specialization in labor skills is not justification for a railroad to use such modern day realities as devices to avoid its responsibilities under the Federal Employers Liability Act, particularly when at the same time it is quick to demand the benefits derived from its franchises and monopolistic position within our economic structure (*Linstead v. Chesapeake & Ohio* [1927] 276 U.S. 28, 34; *Seas Shipping v. Sieracki* [1946] 328 U.S. 85, 95-100; *Shenker v. Baltimore and Ohio Ry.* [1963] 374 U.S. 1, 11; *Sinkler v. Missouri Pacific Railroad* [1958] 356 U.S. 326, 330; *Baker v. Texas and Pacific*

Railroad Company [1959] 359 U.S. 227, 228; *Ward v. Atlantic Coast Line Railroad* [1960] 362 U.S. 396, 398-400).

Dated, San Francisco, California,
September 25, 1974

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(Slip Opinion)

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 73–1270

Eugene C. Kelley, Petitioner, v. Southern Pacific Company. } On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

[December 23, 1974]

MR. JUSTICE MARSHALL delivered the opinion of the Court.

Petitioner Eugene Kelley was seriously injured when he fell from the top of a tri-level railroad car where he had been working. He sought recovery for his injuries from the respondent railroad under the Federal Employer's Liability Act (FELA), 35 Stat. 65, as amended, 45 U. S. C. §§ 51–60. Under the FELA, a covered railroad is liable for negligently causing the injury or death of any person "while he is employed" by the railroad. Although petitioner acknowledged that he was technically in the employ of a trucking company rather than the railroad, he contended that his work was sufficiently under the control of the railroad to bring him within the coverage of the FELA. The District Court agreed, but the Court of Appeals for the Ninth Circuit reversed, 486 F. 2d 1084 (CA9 1973), creating an apparent conflict with a previous decision of the Fourth Circuit, *Smith* v. *Norfolk & Western R. Co.*, 407 F. 2d 501 (CA4), cert. denied, 395 U. S. 979 (1969).[1] We granted certiorari to

[1] Very similar fact situations have arisen in a number of federal and state cases. *E. g., Tarboro* v. *Reading Co.*, 397 F. 2d 941 (CA3 1968), cert. denied, 393 U. S. 1027; *Mazzucola* v. *Pennsylvania R. Co.*, 281 F. 2d 267 (CA3 1960); *Cimorelli* v. *New York Central R.*

resolve the conflict. 416 U. S. 935 (1974). We remand for further proceedings in the District Court.

I

At the time of his accident, petitioner had worked for the Pacific Motor Trucking Co. (PMT), a wholly owned subsidiary of the Southern Pacific Co., for about eight years.[2] PMT was engaged in various trucking enterprises, primarily in conjunction with the railroad operations of its parent company. Among PMT's functions was transporting new automobiles from respondent's San Francisco rail yard to automobile dealers in the San Francisco area. As part of its contractual arrangement with the railroad, PMT would unload automobiles from Southern Pacific's "tri-level" auto-carrying flatcars when they arrived in the yard. It was petitioner's job to unhook the automobiles from their places on the railroad cars and to drive them into the yard for further transfer to PMT auto trailers. PMT maintained the unloading operation in the yard on a permanent basis. Although there were Southern Pacific employees in the area who would occasionally consult with PMT employees about

Co., 148 F. 2d 575 (CA6 1945); *Thornton* v. *Norfolk & Western R. Co.*, 307 F. Supp. 667 (ED Va. 1969); *Hunter* v. *Missouri-Kansas-Texas R. Co.*, 258 F. Supp. 20 (ND Okla. 1966); *Fawcett* v. *Missouri Pacific R. Co.*, 242 F. Supp. 675 (WD La.), aff'd *per curiam*, 347 F. 2d 233 (CA5), cert. denied, 382 U. S. 907 (1965); *Valentine* v. *South Coast Corp.*, 218 F. Supp. 148 (ED La. 1963), aff'd *per curiam*, 334 F. 2d 244 (CA5 1964); *Williams* v. *Chicago & Eastern Illinois R. Co.*, 13 Ill. App. 3d 596, 300 N. E. 2d 266 (1973); *Waters* v. *Chicago & Eastern Illinois R. Co.*, 86 Ill. App. 2d 48, 229 N. E. 2d 151 (1967); *Turpin* v. *Chicago, B. & Q. R. Co.*, 403 S. W. 2d 233 (Mo. 1966), cert. denied, 384 U. S. 1003 (1967); *Drago* v. *Central R. Co.*, 93 N. J. L. 176, 106 A. 803, cert. denied, 251 U. S. 553 (1919).

[2] Petitioner has abandoned his claim that PMT's status as respondent's wholly owned subsidiary should render respondent liable generally for injuries to PMT employees.

the unloading process, PMT supervisors controlled and directed the day-to-day operations.

On July 3, 1963, petitioner was unhooking automobiles in the usual fashion from the top level of one of the tri-level flatcars. A safety cable, normally affixed to the flatcar to protect against falls, was apparently not in place because of an equipment defect. During the unhooking process, petitioner fell from the top of the car and suffered a disabling injury. He subsequently received workmen's compensation payments from PMT. Shortly before the three-year FELA statute of limitations had run, he brought suit against the respondent,[3] claiming it had been negligent in failing to maintain the safety cable in its proper place and in proper working order.

In his complaint, petitioner alleged that he was employed by the respondent railroad within the meaning of the FELA. After a six-day hearing, the District Court, sitting as trier of fact,[4] ruled in petitioner's favor on the employment question. The job of unloading automobiles was the railroad's responsibility, the court found, "pursuant to its contractual responsibilities to the shippers and its tariff responsibilities." In addition, the court found that the railroad supplied the necessary ramps and owned the area in which the PMT employees worked. The responsibility for supervision and control of the unloading operations was respondent's, the court concluded, even though "the exercise thereof was exe-

[3] In most FELA cases a finding of nonemployment does no more than deprive the plaintiff of the various procedural and proof advantages of the Act, since the common law negligence action against a nonemployer is generally available in the alternative. In this case, however, when petitioner brought his FELA suit, the statute of limitations for California's common law negligence action had already run.

[4] Although both parties initially demanded a jury trial, they agreed to try the limited question of employment to the court.

cuted by employees of Pacific Motor Trucking Company." In sum, the court found that PMT was serving generally as the railroad's agent; PMT employees were agents of the railroad for the purposes of the unloading operation; and because the work being performed by petitioner was "in fulfillment of a non-delegable duty of defendant Southern Pacific Company," the relationship between petitioner and the railroad was sufficient to bring him within the coverage of the FELA. After this resolution of the employment issue, the railroad stipulated to its negligence, the parties agreed to set damages at $200,000, and the trial court entered judgment for petitioner in that amount.

The Court of Appeals observed that the District Court had not found that petitioner was "employed" by the railroad, either permanently or at the time of his accident. The court noted that the "while employed" clause of the FELA requires a finding not just of agency but of a master-servant relationship between the rail carrier and the FELA plaintiff. Concluding that the District Court had applied an unduly broad test for FELA liability, the Court of Appeals reversed the District Court's judgment.

II

Petitioner insists that the District Court in effect made a factual finding of employment and that the Court of Appeals erred in upsetting that finding. Of course, even if the District Court made such a finding of employment after applying the proper principles of law, that would not be the end of the matter. Under Fed. Rule Civ. Proc. 52 (a), an appellate court must set aside the trial court's findings if it concludes that they are "clearly erroneous." See *United States* v. *United States Gypsum Co.*, 333 U. S. 364, 394–395 (1948). We need not reach the question whether any of the District Court's findings in this case were clearly erroneous, however, since we

agree with the Court of Appeals that the trial court applied an erroneous legal standard in holding that the plaintiff was within the reach of the FELA. *United States* v. *Singer Manufacturing Co.*, 374 U. S. 174, 194, n. 9 (1963).

The heart of the District Court's analysis was its conclusion that the "traditional agency relationship" between respondent and PMT, in conjunction with the master-servant relationship between PMT and petitioner, was sufficient under the circumstances of this case to bring petitioner under the coverage of the Act. But this Court has repeatedly required more than that to satisfy the "while employed" clause of the FELA. From the beginning the standard has been proof of a master-servant relationship between the plaintiff and the defendant railroad. See *Robinson* v. *Baltimore & Ohio R. Co.*, 237 U. S. 84, 94 (1915); *Hull* v. *Philadelphia & Reading R. Co.*, 252 U. S. 475, 479 (1920); *Baker* v. *Texas & Pacific R. Co.*, 359 U. S. 227, 228 (1959).

In an early FELA case, this Court noted that the words "employee" and "employed" in the statute were used in their natural sense, and "were intended to describe the conventional relation of employer and employee." *Robinson*, 237 U. S., at 94. In *Baker, supra*, the Court reaffirmed that for the purposes of the FELA the question of employment, or master-servant status, was to be determined by reference to common-law principles. The Court in *Baker* referred to sections of the Restatement (Second) of Agency dealing with the borrowed servant doctrine and the general master-servant relationship as a guideline for analysis and proper jury instructions.[5] Section 220 (1) of the Restatement defines a servant as

"a person employed to perform services in the affairs

[5] A year later, in *Ward* v. *Atlantic Coast Line R. Co.*, 362 U. S. 396, 400 (1960), the Court again cited the Restatement as the proper basis for instructing a jury on the various factors that bear on the

> of another and who with respect to the physical conduct in the performance of the services is subject to the other's control or right to control."

In § 220 (2), the Restatement recites various factors that are helpful in applying that definition. While that section is directed primarily at determining whether a particular bilateral arrangement is properly characterized as a master-servant or independent contractor relationship, it can also be instructive in analyzing the three-party relationship between two employers and a worker.

Under common-law principles, there are basically three methods by which a plaintiff can establish his "employment" with a rail carrier for FELA purposes even while he is nominally employed by another. First, the employee could be serving as the borrowed servant of the railroad at the time of his injury. See Restatement (Second) of Agency § 227; *Linstead* v. *Chesapeake & Ohio R. Co.*, 276 U. S. 28 (1928). Second, he could be deemed to be acting for two masters simultaneously. See Restatement § 226; *William* v. *Pennsylvania R. Co.*, 313 F. 2d 203, 209 (CA2 1963). Finally, he could be a subservant of a company that was in turn a servant of the railroad. See Restatement § 5 (2); *Schroeder* v. *Pennsylvania R. Co.*, 397 F. 2d 452 (CA7 1968).

Nothing in the District Court's findings suggests that petitioner was sufficiently under the control of respondent to be either a borrowed servant of the railroad or a dual servant of the railroad and PMT.[6] The District

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factual question of employment. The Court in *Ward* approved an instruction that incorporated several of the factors mentioned in Restatement § 220.

[6] It appears that the District Court consciously declined to make a finding of "employment" or master-servant relation between the railroad and Kelley. Petitioner proposed findings that respondent "had the right to exercise control over the details of the work being performed by [petitioner]," that the parties "believed that the rela-

Court's findings come closest to suggesting a subservant relationship running from the railroad through PMT to petitioner. But even that theory fails on the findings in the trial court, since those findings did not establish the master-servant relationship between respondent and PMT necessary to render petitioner a subservant of the railroad.

The District Court found that PMT employees exercised supervision and control over the unloading operations, although the railroad bore the "responsibility" for those functions. On these facts, the District Court was plainly correct in concluding that PMT was an agent of the railroad. But a finding of agency is not tantamount to a finding of a master-servant relationship. See Restatement (Second) of Agency § 2. The finding that the railroad was "responsible" for the unloading operations is significantly weaker than would be a finding that it controlled or had the right to control the physical conduct of the PMT employees in the course of their unloading operations. The railroad would satisfy the District Court's "responsibility" test whenever it agreed to perform a service and subsequently engaged another company to perform that service for it on its premises. The "control or right to control" test, by contrast, would be met only if it were shown that the role of the second company was that of a conventional common-law servant. Accordingly, we agree

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tionship of master and servant existed" between them, and that petitioner "was an 'employee' of defendant Southern Pacific Company." The court declined to make any of these three proposed findings, although it adopted several of petitioner's less critical proposed findings in whole or in part. Moreover, the court specifically found that at the time of his injury, petitioner was in the employment of PMT, a finding that petitioner, of course, had not requested.

[7] The District Court appeared to place substantial weight on its finding that the unloading operation was a "non-delegable duty" of the railroad, "pursuant to its contractual responsibilities to the shippers and its tariff responsibilities." But the fact that respondent

with the Court of Appeals that the District Court's test for FELA coverage was too broad.

III

The dissenters argue that even if the District Court erred in defining the applicable legal standard, we should reverse the Court of Appeals and reinstate the judgment of the District Court. The facts found by the District Court, they contend, satisfied the requirements of the "while employed" clause, even under the proper test. We disagree.

As we noted in Part II, the District Court's findings concerning the contractual relationship between PMT and the railroad fall far short of compelling the conclusion that Kelley was employed by Southern Pacific. The court's other factual determinations add no more force to the claim. The findings that Kelley's crew worked most of the time on the railroad's premises and that railroad employees were responsible for checking safety conditions on the tri-level cars reflect the fact that the activities of the two companies were closely related and necessarily had to be coordinated. Railroad employees tending the cars and PMT employees unloading them naturally had substantial contact with one another. In addition, Southern Pacific supervisory personnel were occasionally in the area where PMT conducted its unloading operations and from time to time would advise or

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undertook the contractual obligation to unload the cars and added the unloading cost to its overall charge to the shipper does not affect the nature of its arrangement with PMT. The railroad was free either to use its own employees to unload the automobiles or to subcontract the work to another company. Nor did the publication of tariffs for the unloading services automatically render anyone who performed those tasks an employee of the railroad for FELA purposes. See *Norman* v. *Spokane, P. & S. R. Co.*, 101 F. Supp. 350 (Ore. 1950), aff'd *per curiam*, 192 F. 2d 1020 (CA9 1951).

consult with PMT employees and supervisors. But the trial court did not find that Southern Pacific employees played a significant supervisory role in the unloading operation or, more particularly, that petitioner was being supervised by Southern Pacific employees at the time of his injury.[8] Nor did the court find that Southern Pacific employees had any general right to control the activities of petitioner and the other PMT workers.[9]

The two companies were sufficiently distinct in organization and responsibility that there was no apparent overlap in the supervisory ranks. Indeed, the labor contract between the Teamsters and PMT expressly provided that the PMT employees would be subject only to the control of PMT supervisors. In light of the analysis in this Court's previous cases, the District Court's findings clearly fail to establish that petitioner was "employed" by the railroad.

In *Robinson* v. *Baltimore & Ohio R. Co., supra,* the petitioner was an employee of the Pullman Company, serving as porter in charge of a Pullman car that was

[8] Petitioner has pointed to testimony from PMT employees who stated that in the course of the unloading operation they had contact with various Southern Pacific employees, including clerks, who would check on arriving and departing cars, "car-whackers," who were responsible for car maintenance and inspection, and switchmen, who would occasionally ask the PMT employees to indicate when they were finished working on a car so that the switch engine could clear the tracks. These contacts, however, were plainly not supervisory in nature and do not buttress petitioner's claim to railroad employment.

[9] In addition to the findings discussed above, the District Court found that petitioner had worked for PMT for a substantial period, that he performed unskilled labor, and that he was compensated by an hourly wage. While these factors are generally relevant to the employment inquiry, see Restatement (Second) of Agency §§ 220 (2)(d), (f), (g), we fail to see how they aid petitioner here. They make it plain that Kelley was a general servant of PMT, but neither the District Court nor the dissenters explain how they bear significantly on respondent's control or right to control Kelley's activities.

hauled by the respondent railroad. Although the Pullman employees worked closely with railroad employees, and although the Pullman car was an integral part of the railroad operation, the Court held that that was not enough to make petitioner an employee of the railroad for the purposes of the Act. Even the petitioner's responsibility for taking tickets or fares of passengers boarding the Pullman car at night was not enough to make him a servant of the railroad. This service was merely an accommodation to the railroad, not a demonstration of the railroad's right to control the conduct of the Pullman employee. The Court stated that at the time the Act was passed, "[i]t was well known that there were on interstate trains persons engaged in various services for other masters. Congress, familiar with this situation, did not use any appropriate expression which could be taken to indicate a purpose to include such persons among those to whom the railroad company was to be liable under the Act." *Id.*, at 94. The Pullman company, like PMT in this case, selected its own employees, and it "defined their duties, fixed and paid their wages, directed and supervised the performance of their tasks, and placed and removed them at its pleasure." *Ibid.*

In the following year, the Court was again faced with the question whether a particular worker was an employee of the railroad that had caused his death, or whether he was an independent contractor. *Chicago, Rock Island & Pacific R. Co.* v. *Bond*, 249 U. S. 449 (1916). The decedent had been engaged by the railroad to procure coal and wood and to perform various other services at its loading center in Enid, Oklahoma. Although the railroad directed the decedent's activities to some extent, the Court observed that those directions were simply reformulations of the flexible obligations assumed by the decedent under his contract, not "a detailed control of the

actions of [decedent] or those of his employees." The arrangement by which decedent had been engaged to provide services for the railroad, the Court concluded, was "not the engagement of a servant submitting to subordination and subject momentarily to superintendence, but of one capable of independent action, to be judged of by its results."

In *Bond* the Court relied on the earlier decision in *Standard Oil Co.* v. *Anderson*, 212 U. S. 215 (1909), to clarify the distinction between a contractor and an employee. In that case, a longshoreman was injured when a winch operator negligently lowered a load of oil cases on him. Petitioner, the general employer of the negligent winchman, argued that at the time of the accident the winchman was the borrowed servant of the stevedoring company, the longshoreman's employer. The Court, however, held that the winchman was not a servant of the stevedore but the servant of an independent contractor. The general employer had not furnished the employee to the stevedore, the Court wrote; it had furnished only the employee's work. Focusing on the locus of the power to control and direct the servant's work, the Court emphasized the importance of distinguishing between "authoritative direction and control, and mere suggestion as to details or the necessary cooperation, where the work furnished is part of a larger undertaking." *Id.*, at 222. Cf. *Denton* v. *Yazoo & Mississippi Valley R. Co.*, 284 U. S. 305 (1932).

In this case, as in *Anderson*, the evidence of contacts between Southern Pacific employees and PMT employees may indicate not direction or control, but rather the passing of information and the accommodation that is obviously required in a large and necessarily coordinated operation. See *Del Vecchio* v. *Pennsylvania R. Co.*, 233 F. 2d 2, 5 (CA3 1956). The informal contacts between

the two groups must assume a supervisory character before the PMT employees can be deemed *pro hac vice* employees of the railroad.[10]

The factual setting of *Baker* v. *Texas & Pacific R. Co., supra,* provides an instructive contrast. Petitioner in *Baker* was nominally employed by a contractor who was engaged in maintenance work for the railroad. At trial, he introduced evidence to show that his work was part of the maintenance task of the railroad and that the material he was pumping into the roadbed was supplied

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[10] The Court in *Shenker* v. *Baltimore & Ohio R. Co.*, 374 U. S. 1 (1963), applied the analysis of *Anderson* in a factual setting somewhat analogous to that of the present case. The petitioner in *Shenker* was employed as a janitor for the B&O Railroad. In addition to his work for the B&O, he maintained a nearby rail station and performed various services for the Pittsburgh and Lake Erie Railroad (P&LE). Although petitioner was on P&LE's premises and was doing P&LE's work when he was injured, the Court noted that "there can be no question that the petitioner is an employee of the B&O." *Id.*, at 5. Citing *Anderson*, the Court wrote that

"under the common-law loaned-servant doctrine immediate control and supervision is critical in determining for whom the servants are performing services. In the present case, the undisputed facts show that the petitioner was at all times paid by the B&O and under the sole supervision of B&O employees. The intimations of the B&O that the petitioner might have been given directions by the P&LE baggageman is at most an example of the minimum cooperation necessary to carry out a coordinated undertaking, and, as noted in *Anderson*, cannot amount to control or supervision." *Id.*, at 6 (footnote omitted). Accord, *Hull* v. *Philadelphia & Reading R. Co., supra,* 252 U. S., at 479–480. In *Linstead* v. *Chesapeake & Ohio R. Co., supra,* the Court held that the borrowed servant test was met where an employer had made the services of several of its employees available to the C&O Railroad for a specific purpose. Linstead, a conductor employed by the Big Four Railroad was instructed to accompany a C&O train along C&O tracks between Kentucky and Ohio, under the immediate supervision of a C&O trainmaster. On these facts, the Court held that he was the "special employee" of the C&O and could recover from that railroad under the FELA.

by the railroad. Most significantly, there was evidence to show that

> "a supervisor, admittedly in the employ of the railroad, in the daily course of the work exercised directive control over the details of the job performed by the individual workmen, including the precise point where the mixture should be pumped, when they should move to the next point, and the consistency of the mixture." 359 U. S., at 228–229.

Because the evidence of control or right to control was in serious dispute, the Court held that the case must be permitted to go to the jury. As we have indicated, however, the District Court found no such day-to-day supervision that would support a finding that petitioner and his coworkers were, in effect, employees of the railroad.

IV

We part company with the Court of Appeals on the propriety of a remand. The court rendered judgment for respondent apparently because it determined that the District Court had found that there was no employment relationship, or because it had decided on its own that any such finding would have been clearly erroneous. Yet, while the District Court's failure to adopt petitioner's proposed findings of fact relating to employment is of some significance in determining what that court deemed to be the requirements of the "while employed" clause, see n. 6 *supra*, it is not enough to constitute a reviewable finding that there was no master-servant relationship between petitioner and the railroad. Similarly, while the Court of Appeals may have meant to suggest that in its view the record could not support a finding of employment, that suggestion is not developed in its opinion, and we think the best course at this point is to require the trier of fact to re-examine the record in light

of the proper legal standard. Accordingly, we remand the case to the Court of Appeals with instructions to remand to the District Court for further findings in accordance with this opinion.

Remanded with instructions.

SUPREME COURT OF THE UNITED STATES

No. 73–1270

Eugene C. Kelley, Petitioner,
v.
Southern Pacific Company.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

[December 23, 1974]

MR. JUSTICE STEWART, concurring in the judgment.

In determining Kelley's status under the FELA, the District Judge apparently relied on general agency principles, rather than on the particular principles of master-servant law. This was error, and it is thus proper to remand this case to the District Judge so that he can take a fresh look at the record, in light of the correct legal standard.

The correct standard is not a novel one. The law of master and servant has been with us for a long time, and its adequate exposition elsewhere, *e. g.*, Restatement (Second) of Agency §§ 220, 226, 227, and 5 (2), renders much of the Court's extended discussion unnecessary. But my chief problem with the Court's opinion is its insistence upon dissecting the particularized evidence in this case. Whether or not the Southern Pacific Company controlled or had the right to control Kelley's work is for the original factfinder to determine.

The Court today substantially invades the trial court's function. If the Court wishes to decide the issue itself, a remand is unnecessary. If the Court wishes to leave the decision to the District Judge, who saw the evidence and heard the witnesses, much of the detailed discussion of the evidence in the Court's opinion is gratuitous.

I believe that both the efficient allocation of judicial resources and the ends of justice are best served by a

remand—but a genuine remand, affording the District Judge latitude to perform his proper function as fact-finder. Because the Court's opinion bristles with broad hints that a finding of FELA coverage would be clearly erroneous, its remand of this case seems to me to approach disingenuousness.

SUPREME COURT OF THE UNITED STATES

No. 73–1270

Eugene C. Kelley, Petitioner,
v.
Southern Pacific Company.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

[December 23, 1974]

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE BRENNAN concurs, dissenting.

Today's decision marks a return to the era when the FELA was interpreted in a hostile and restrictive manner by the federal judiciary. Accordingly I am constrained to register my dissent.

The first Employers' Liability Act was enacted in 1906, 34 Stat. 232, and this Court responded by holding the Act unconstitutional. *Employers' Liability Cases,* 207 U. S. 463. Congress tried again in 1908 and produced the Act which is now in effect. 45 U. S. C. § 51 *et seq.* This time the Court upheld the statute, *Second Employers' Liability Cases,* 223 U. S. 1, but judicial hostility did not end. The defense of assumption of risk was, for the most part, held to be still available to the employer. *Seaboard Air Line R. Co.* v. *Horton,* 233 U. S. 492. The Act sought expressly to control the use of a contributory negligence defense, but the Court circumvented this to a considerable degree by developing the doctrine of "primary duty." See *Great Northern R. Co.* v. *Wiles,* 240 U. S. 444. Finally, in 1939, the Congress decided that further legislation was needed. 53 Stat. 1404. The result was a more liberal view of the Act which did not provide the employer with so many defenses. See *Tiller* v. *Atlantic Coast Line,* 318 U. S. 54.

Since 1939 this Court has interpreted the Act in the spirit of those amendments. Gradual liberalization has occurred, and the narrow, technical approach of earlier years has been eschewed. See W. Prosser, The Law of Torts 536–537 (4th ed. 1971). This development did not occur without dissent. Divisions of opinion occurred on the merits and also on the question of whether the Court should involve itself in this area at all. See, *e. g.*, *Rogers* v. *Missouri Pacific Railroad*, 352 U. S. 500. Nevertheless, the Court continued to oversee the application of the Act and to insist that judicial interpretations be consistent with the Act's overall purpose.

One of the questions which has arisen under the Act has been the definition of employment. Section 1 of the FELA, 45 U. S. C. § 51, provides that the carrier is liable in damages for injury or death resulting to an employee from the carrier's negligence. But the damage must be done to the one injured or killed "while he is employed" by the carrier. In the past judges have sometimes tried to give this requirement a rigid, technical content, but such an approach has been rejected by this Court.

In *Baker* v. *Texas & Pacific R. Co.*, 359 U. S. 227, the petitioner's decedent had been hired as a workman by W. H. Hichols & Co., a firm which had entered into a contract with the respondent railroad. The decedent was working along the main line of the railroad performing various operations designed to strengthen and stabilize the roadbed. He was killed when he was struck by a train. The trial judge refused to submit the issue of employment to the jury and held that as a matter of law the decedent was not in an employment relationship with the railroad at the time of his death. This Court reversed on the ground that whether the decedent was an employee within the meaning of the Act was properly a question for the jury. Noting that the terms "employee" and "employed" are not used in any "special sense," the

Court reasoned that the issue of employment "contains factual elements such as to make it one for the jury under appropriate instructions as to the various relevant factors under law. See Restatement, Agency 2d § 220, comment *c*; § 227, comment *a*."

Ward v. *Atlantic Coast Line R. Co.*, 362 U. S. 396, involved similar considerations to those in *Baker*. The petitioner was employed as a laborer by the railroad, but he was working on his day off with a crew which was fixing a siding track that belonged to a third party. Since the petitioner was being paid by this third party on the day of the injury, a question existed as to whether the petitioner was an employee of the railroad at the time of the accident. We held that the trial judge had improperly charged the jury to consider only one factor, that of the awareness of the victim that he was working for a third party on the day in question. We noted that a number of factors must be considered under Restatement, Agency 2d § 220.

Many courts of appeals have been confronted with problems similar to those in *Baker* and *Ward*, and they too have taken a nontechnical approach based on the various aspects of the particular case presented. For example, in *Missouri K–T R. Co.* v. *Hearson*, 422 F. 2d 1037 (CA10), the injured worker was a car cleaner. The railroad had stopped doing its own car cleaning and had hired a firm to do the job, and the injured worker was nominally the employee of this hired firm. But upon examining all the factors the Court of Appeals affirmed the District Court ruling that reasonable men could not differ in the conclusion that the victim was in an employment relationship with the railroad for FELA purposes. In *Schroeder* v. *Pennsylvania Railroad*, 397 F. 2d 452 (CA7), the deceased worker was nominally an employee of a trucking company which was under contract to perform certain pickup and delivery services for the rail-

road. Considering all the facts the Court of Appeals held that the trial judge had properly submitted to the jury the question of whether the deceased had been employed by the railroad for FELA purposes. Many more cases of a similar nature exist. See, *e. g.*, *Byrne* v. *Pennsylvania Railroad*, 262 F. 2d 906 (CA3); *Cimorelli* v. *New York Cent. R. Co.*, 148 F. 2d 575 (CA6). But see, *e. g.*, *Fawcett* v. *Missouri Pacific Railroad*, 242 F. Supp. 675, aff'd, 347 F. 2d 233 (CA5).

The case most clearly on point from another court of appeals is *Smith* v. *Norfolk and Western R. Co.*, 207 F. 2d 501 (CA4). There the injured worker was also employed by a company which unloaded autos from railroad cars, and, like the petitioner here, the worker fell to the ground from the top tier of one of the cars. The District Court granted the worker summary judgment, since it had no doubt that he was an employee of the railroad within the meaning of the FELA. The Court of Appeals affirmed using the following language: "Though employees of independent contractors are not accorded coverage under the Act . . . if the injured worker is employed by an agent or adjunct of the railroad he will be treated as an employee of the railroad for the purposes of the Act. . . . Thus traditional concepts of agency extend the coverage of the Act." The District Court in this case relied on the language of the Court of Appeals in *Smith* v. *Norfolk and Western R. Co.*, *supra*. The Court today holds that this language misstates the law.

All servants[1] are agents of their masters. Restatement, Agency 2d § 2 (2). But many agents are not servants within the meaning of § 220 of the Restatement. For example, an agent may be an independent contractor,

[1] The term "servant" as used in the Restatement expresses the same concept that "employee" does within the meaning of the FELA. Restatement, Agency 2d § 220, comment *g*.

but an independent contractor may never be a servant. *Id.*, § 14N, comment *a*. In *Baker* and *Ward* we referred to the Restatement as a source of principles which provide a basis for the factual decision as to whether an individual is an employee for FELA purposes. Under those principles an employee must be a servant and not merely an agent.[2]

Because the District Court in the present case used the word agent rather than servant or employee it committed a technical error. But our inquiry here should not be limited to a narrow examination of whether the right form of words was used to support a judgment in favor of a seriously injured worker. The District Court found that the requisite relationship was present to permit a recovery under the FELA, and we should ask whether the findings of fact that were made were sufficient to support that conclusion under the legal standard as correctly described.

The District Court made numerous findings of fact which support its conclusion that the FELA is applicable here, and these findings have not been held to be "clearly erroneous" under Fed. Rule Civ. Proc. 52 (a). Petitioner had been working in the job of unloading automobiles from respondent's railroad cars for eight years. § 220 (2)(f); § 227, comment *c*. The work performed was that of respondent, to be performed in the general course of respondent's business pursuant to its contractual responsibilities. § 220 (2)(h). The work was of an unskilled variety. § 220 (2)(d); § 227, comment *c*. Petitioner was paid by the hour. § 220 (2)(g). The record was unclear as to who supplied the necessary

[2] Support for this point is found in the fact that, as noted by the Court of Appeals below, Congress once rejected a proposal that suppliers of accessorial services to railroads be included under the FELA. See S. Rep. No. 661, 76th Cong., 1st Sess., 2 (1939).

hammers and wrenches, but respondent clearly supplied the necessary ramps and working area, and it was responsible for safety. § 220 (2)(e). Respondent had the immediate responsibility for supervision and control of the work, though this task was carried out by others who, like petitioner, were servants of Pacific Motor Trucking Company. § 220 (2)(a).[3]

There are basically two reasons for the Court of Appeals' reversal of the District Court's holding in petitioner's favor. First, the District Court found that petitioner was an employee of the trucking company. But this does not mean that petitioner was not also an employee of the railroad for the purposes of the FELA. In *Byrne* v. *Pennsylvania Railroad, supra,* at 910, the victim was an employee of Westinghouse who was work-

[3] The value of examining multiple factors such as these is that it permits the analyst to avoid reliance on abstract inquiries as to kinds and degrees of control. Some factors—such as who is responsible for supervision, whose work is being performed, and who supplies the tools and place of work—are of obvious relevance. Other factors, though perhaps of less weight, are also helpful. For example, the skill of the worker and the manner in which he is paid are relevant to the ease with which control over him may be shifted from one master to another. And the length of time that the nominal servant of one master has been aiding in the business of another is likewise indicative of a shift in control.

Section 220 (2) provides a number of factors which it states should be considered "among others." Another factor which might be considered in this case is that Pacific Motor Trucking Company is a wholly owned subsidiary of respondent. The Court of Appeals noted that no case has been made for piercing the corporate veil and thus disregarding the fact that the railroad and the trucking company are separate entities. Indeed, petitioner does not urge that we do so. Brief for Petitioner, at 6 n. 3. If the corporate veil were to be pierced that would presumably end the inquiry, an inappropriate result on this record. Nevertheless, it seems reasonable to take into account as one of many factors the relationship between the trucking company and the respondent.

ing on a railroad locomotive at the time of his death. The Court of Appeals noted in that case that "[t]here is, of course, no question but that [the victim] was an employee of Westinghouse. The issue is whether sufficient evidence was adduced to enable the jury to conclude that [the victim] was also an employee of the Railroad." See Restatement, Agency 2d §§ 226 & 227. If the mere fact that an individual is on the payroll of someone other than the railroad sufficed to make that individual not an employee of the railroad for FELA purposes, then this Court would not have found it necessary to reverse in the *Baker* case. Such a simple test could be devised, but whether such a change in the law is to be made should be up to Congress to decide.

The second reason the Court of Appeals used for reversing the District Court was that the District Court had rejected a finding that petitioner was an employee of the railroad. The trial judge was relying on the "agency" language of *Smith* v. *Norfolk and Western R. Co., supra,* and he therefore apparently had his labels confused. He was using the concept of employment in a narrow and restricted way yet was expanding it to accommodate decisions such as *Baker* by including both employment and agency relationships within the scope of the FELA. If the District Judge did not find an employment relationship in this narrow sense, that fact is unimportant, for he did find a relationship sufficient to satisfy the correct test. While he used language of agency he gave that language the substantive content of *Baker* and of the source relied upon by *Baker*—Restatement, Agency 2d § 220. He made findings of fact easily sufficient to support the existence of an employment relationship under the correct substantive test, and he in fact found that the requisite relationship existed. The fact that he used the word "agency" rather

than the word "employment" to describe this relationship is thus of no more than technical, abstract concern. This is not the sort of concern that should motivate us in the FELA context.

The majority here has taken a different tack from that of the Court of Appeals. Citing numerous cases from the era before the 1939 amendments to the Act, the majority argues that the railroad here exercised insufficient control over the petitioner to establish the requisite employment relationship. Under the approach taken in *Baker* and *Ward*, however, the existence of a master-servant relationship is to be determined from an examination of many factors. This is quite different from the majority's concentration on technical distinctions regarding kinds and degrees of control and cooperation.[4] As I have indicated, I think that a judgment in favor of the petitioner is quite justified on the basis of facts already found by the District Court. I have no strong objection to the decision that the case be remanded for new findings in light of the correctly stated legal standard, but I dissent from the rigid and old-fashioned standard of liability which the majority indicates should be made applicable.

In a strictly doctrinal sense this case may not have a great impact on the coverage of the FELA, but I fear that the precedent set today bodes ill for the future. It distorts the accepted meaning of the Act and reflects a judicial hostility to the FELA of the kind that existed prior to the 1939 amendments.

I would reverse the judgment below.

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[4] The majority relies on two modern cases, *Baker* and *Shenker* v. *Baltimore & Ohio R. Co.*, 374 U. S. 1. But there is nothing in these cases to indicate that technical distinctions between control and cooperation are the only subjects of investigation in considering whether a master-servant relationship exists under the FELA.

SUPREME COURT OF THE UNITED STATES

No. 73–1270

Eugene C. Kelley, Petitioner,
v.
Southern Pacific Company.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

[December 23, 1974]

MR. JUSTICE BLACKMUN, dissenting.

The Court in its decided cases has traveled far in order to accord Federal Employers Liability Act coverage to a variety of employment situations. See, for example, *Shenker* v. *Baltimore & Ohio R. Co.*, 374 U. S. 1, 5 (1963), and *North Carolina R. Co.* v. *Zachary*, 232 U. S. 248, 260 (1914). Its many decisions are now a well-chalked slate that should not be significantly erased without good reasons. Neither should the Court change a mature and highly developed legal standard, long accepted by Congress, without explaining those reasons or even saying what the effect will be.

For me, the Court's *per curiam* opinion in *Baker* v. *Texas & Pacific R. Co.*, 359 U. S. 227 (1959), controls this case. There the injured workman had been hired by a corporation engaged in work along the railroad's main line right-of-way. The work consisted of pumping sand and cement into the roadbed in order to strengthen and stabilize it. The workman was struck by a train while engaged at this job. The petitioners contended that he was killed while he was "employed" by the railroad, within the meaning of the Act. Evidence on the question was introduced, but the trial judge declined to submit the issue to the jury, holding as a matter of law that the workman was not in such a relationship to the railroad at the time of his death as to entitle him to the

Act's protection. The state courts refused to disturb the judgment for the railroad.

This Court, however, held that the Act does not use the terms "employee" and "employed" in any special sense, and that the familiar general legal problems as to whose employee or servant a worker is at a given time present themselves as matters of federal law under the Act. Each case, the Court said, must be decided on its peculiar facts and "ordinarily no one feature of the relationship is determinative." The Court concluded that it was "perfectly plain" that the question "contains factual elements such as to make it one for the jury under appropriate instructions as to the various relevant factors under law." *Id.*, at 228. It pointed out that the petitioners introduced evidence tending to prove that the work "was part of the maintenance task of the railroad"; that the road "furnished the material to be pumped into the roadbed"; and that a supervisor, admittedly in the employ of the railroad, in the daily course of the work exercised directive control over the details of the job. *Ibid.* The railroad introduced evidence tending to controvert this. The Court then held that an issue for determination by the jury was presented.

So it is here. Kelley was injured at the railroad's loading and unloading ramp in San Francisco. He and others were unchaining new automobiles for unloading when he fell from the third level of the railroad car. He was hired, paid by, and could be discharged by the railroad's wholly owned subsidiary. All the officers and directors of that subsidiary were officers or directors of the railroad. The subsidiary was the only company then having a contract with the railroad to unload cars at that ramp. Kelley had been employed at this particular job and at this site for eight years and was paid on an hourly basis. The unloading was the railroad's responsibility

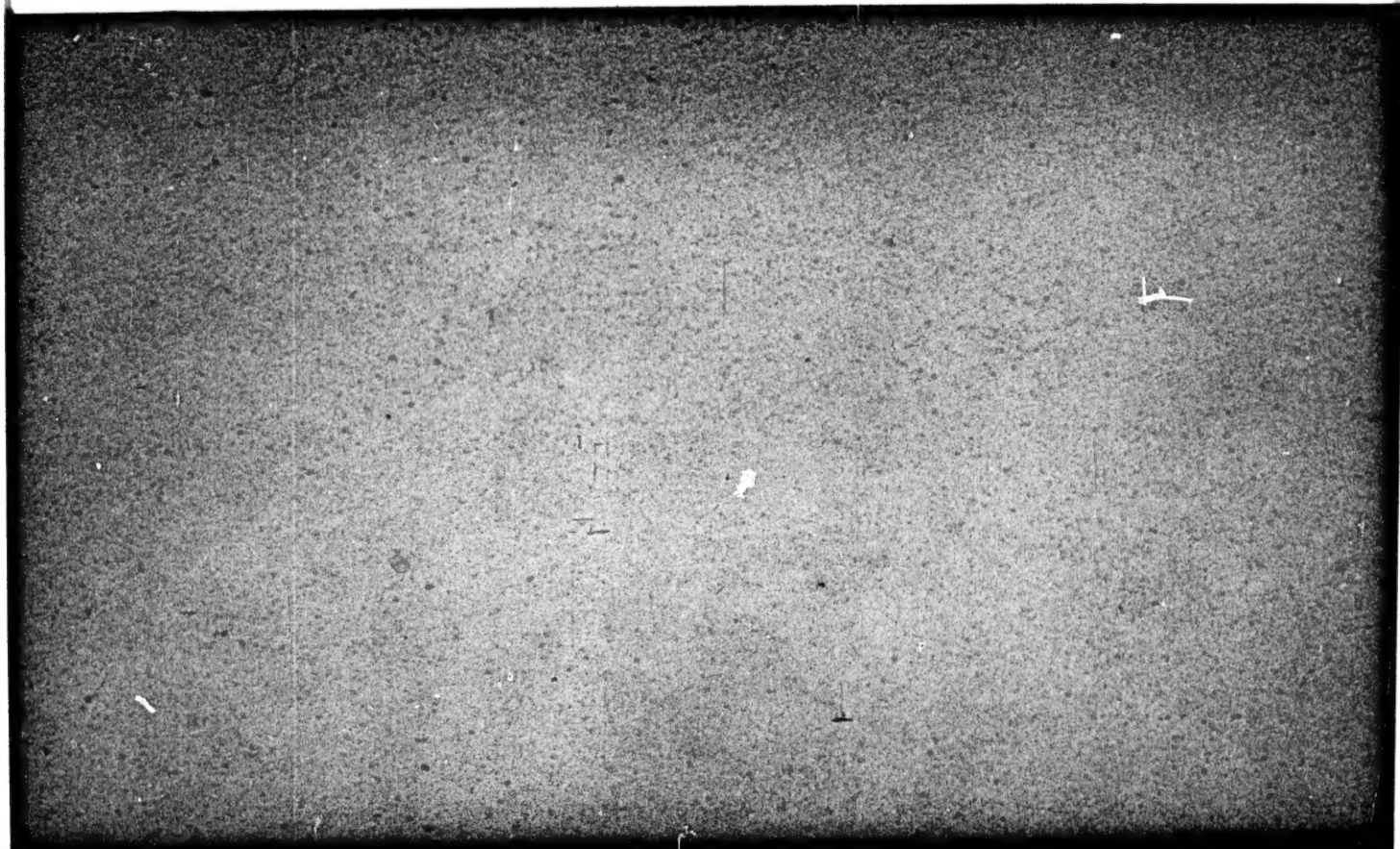
pursuant to its contractual obligation to its shipper. The railroad supplied the necessary working area. The work performed by Kelley was unskilled. Railroad employees had the responsibility daily to check the safety of the cars and to make necessary repairs. There was evidence that the railroad exercised a degree of control over the unloading operation and that PMT employees performing this work frequently felt they had to heed the railroad supervisor's command.*

All this, it seems to me, is enough to create an issue for the trier of fact, just as the *Baker* case illustrates and as it teaches. The trier could find that Kelley was doing work of a kind and in a way and under such supervision of the Southern Pacific as made him an employee of that railroad for purposes of the FELA.

I feel the Court in its footnote 6, *ante*, p. 6, gives undue emphasis to the District Court's treatment of findings of fact proposed by the petitioner. Every actively practicing trial attorney knows that some judges readily adopt findings presented by counsel; that other judges almost always reject proposed findings and prefer to draft their own or have their clerks prepare them; and that still others adopt a middle course. In this case the District Court produced a judgment for the injured workman. I doubt whether there can be much significance in the adjustment-of-proposed-findings route by which that judgment was reached.

While the Court disclaims any modification of the standards for allowing questions of fact in FELA cases to go to the jury, its decision here suggests otherwise. The Court implies that supervision must be "day-to-day"

*There was testimony by PMT employees that in practice they took instructions and directions from Southern Pacific supervisors, and that failing to follow them could jeopardize their jobs. *E. g.*, App. 57.



in order to constitute "supervision" for purposes of creating "employee" status under the FELA. *Ante*, p. 13. Does this mean that orders must be issued with a certain frequency (*e. g.*, every day, or most days) or merely in a certian manner (*e. g.*, the "daily" normal "course of the work," *Baker, supra*, 359 U. S., at 228–229)? The Court does not say. I suspect that trial judges will be inclined to resolve most doubts against plaintiffs if their findings are to be so vulnerable to challenge.

I also fear that the Court's holding may be one that opens the way for the railroads of this country to avoid FELA liability. That way apparently is to contract out large portions of maintenance and loading and unloading responsibilities that normally are part of the railroad's operation.

I would reverse the judgment of the Court of Appeals, and I therefore dissent.